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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 266

HAROLD L. ICKES, SECRETARY OF THE INTERIOR, PETITIONER

vs.

MAZINE Z. FOX ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

PETITION FOR CERTIORARI FILED AUGUST 7, 1936
CERTIORARI GRANTED OCTOBER 12, 1936

SUPREME COURT OF THE UNITED STATES

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1 [Caption omitted.]

In Supreme Court of the District of Columbia, holding an equity court

Equity No. 57738

MAZINE Z. FOX AND JOSIE R. FOX, HIS WIFE, PLAINTIFFS

vs.

HAROLD L. ICKES, SECRETARY OF THE INTERIOR, DEFENDANT

Bill of complaint

Filed September 24, 1934

To the honorable Supreme Court of the District of Columbia, holding an equity court:

The plaintiffs respectfully represent that they are citizens of the United States and of the State of Washington, residing near Mabton, in Yakima County, Washington, and that their post-office address is Mabton, Washington, and that they bring this suit in their own right and in their own behalf against Harold L. Ickes, a citizen of the State of Illinois, residing in the District of Columbia, in respect of the matters and things hereinafter set forth.

I

That the plaintiffs are husband and wife and the owners and in the possession of the following-described real estate located within the Sunnyside unit of the Yakima project, to wit:

North half of the north half of the northwest quarter of the southwest quarter of section 36, township 9 north, range 22 E. W. M.,

The south half of the north half of the northwest quarter of the southeast quarter of section 36, township 9 north, range 22 E. W. M.,

South half of the northeast quarter of section 36, township 9 north, range 22 E. W. M.,

2 and that there is appurtenant to said land a water right for a sufficient amount of water to beneficially and successfully irrigate the same from the natural flow of the Yakima River and storage reservoirs hereinafter mentioned, constructed under and by virtue of the reclamation act herein referred to, and the right to have said water stored and impounded in the reservoirs herein described and carried in said river and in the canals and distribution system of the Sunnyside unit of the Yakima project to said land; that the amount of water so appurtenant to plaintiffs' land is in excess of 4.84 acre-feet per acre per annum, measured at the land during the irrigation season and the vested right to said water right and to said easement vests in the plaintiffs and is appurtenant to said real estate.

II

That the defendant is now and has been since, to wit, March 5th, 1933, the duly appointed, qualified, and acting Secretary of the Interior of the United States, and as such has charge of the administration of the laws of the United States relating to irrigation and reclamation projects constructed by the United States, and particularly of the administration of the act of Congress known as the Reclamation Act, being the act of June 17th, 1902 (32 Stat. 388), as amended and supplemented by later acts of Congress, and that said defendant is sued in his official capacity as such Secretary of the Interior as hereinafter set forth.

III

That in 1906 the then Secretary of the Interior approved an irrigation and reclamation project known as the Sunnyside unit of the Yakima project, which included the land herein described and on behalf of the United States of America purchased from the Washington Irrigation Company the Sunnyside Canal, water appropriations and irrigation system used in connection therewith; that thereafter and on March 2nd, 1909, the then Secretary of the Interior, by public notice and order, fixed the price to be charged each irrigable acre of the lands herein described and other lands in private ownership, at the sum of $52.00 per acre; that in fixing and determining construction charges to be made and collected in said unit the then Secretary of the Interior estimated and allocated the cost of the various features of said project, including reservoirs for storage purposes common to said unit and the charge per acre for irrigable lands included within said unit, and the charge per acre of irrigable lands included within said unit as estimated by the then Secretary of the Interior were sufficient according to said allocation to return to the reclamation fund of the United States the sum that had been expended or would be expended in the building and construction of the storage reservoirs and irrigation system; that thereafter the then Secretary of the Interior did cause to be constructed and completed storage reservoirs by which the flood water of the Yakima River and its tributaries were collected and empounded during the period of freshets, high water, and during the season when water was
3 not needed for irrigation and of sufficient capacity to furnish sufficient water in normal season to beneficially and successfully irrigate the land herein described and all other lands in the Sunnyside unit of the Yakima project and all other lands entitled to receive water from the Yakima River and said storage reservoirs.

IV

That about the time of the purchase by the Secretary of the Interior for the United States of said irrigation system and at the time the construction of said project was contemplated and considered by

the then Secretary of the Interior, it was stated and represented by the then Secretary of the Interior, his representatives and subordinates, that before said project could be purchased or the construction of said works could be undertaken that the owners of the land herein described and other lands susceptible to irrigation by gravity flow from said system should cooperate with the then Secretary of the Interior to the extent of incorporating the Sunnyside Water Users Association and placing their said private lands in said project and agreeing to take water for the purpose of irrigating their said lands from said project, and that for the purpose of inducing said landowners of said private lands to so cooperate with the then Secretary of the Interior and to incorporate the Sunnyside Water Users Association and to place their lands under said project and agree to take water therefrom and execute a stock subscription contract and water-right application for the purchase of the water therefrom, it was represented and stated by the representatives and subordinates of the then Secretary of the Interior that beneficial use was the basis, the measure, and the limit of the water right that would be furnished and that a sufficient amount of water would be furnished to successfully and beneficially irrigate the land herein described at all times during the irrigation season, save and except in extremely dry years, and that the entire cost of building and constructing said completed works would not exceed the sum of $52.00 per acre; that said representations and statements so made by the Secretary of the Interior of the United States and by his representatives and his subordinates were made on numerous occasions and at mass meetings held by said private landowners at the request of said representatives and subordinates for the purpose of considering the advisability of entering into said arrangement and aiding and participating in the construction and promotion of said enterprise; that at that time the question as to the amount of water that would be delivered and the cost to the owner of said land in the construction and completion of said project were matters of vital importance and were also matters as to which the then owners of the land herein described were not otherwise advised and they were compelled to rely upon the statements and representations of the then Secretaries of the Interior, their representatives and subordinates.

V

That the then owners of the land herein described and predecessors in title of plaintiffs relied absolutely and entirely upon the aforesaid statements and representations and upon the statements and
4 representations in this complaint set forth, believed them to be true, and would not, except for such statements and representations, have participated in the incorporating of said Sunnyside Water Users Association and would not have subscribed for shares of stock therein and would not have executed the water-right application as herein alleged to take water for their said land from said project but for such statements and representations; that being induced and per-

suaded thereby, the then owners of the land herein described and the owners of additional land under gravity flow of said irrigation system did, as a matter of fact, proceed to incorporate the Sunnyside Water Users Association as herein set forth and that said association by reason of such statements and representations and inducements was organized and incorporated and thereafter a contract was entered into between said association and the then Secretary of the Interior, acting for and on behalf of the United States, a copy of which is hereto attached, marked "Exhibit A", and made a part hereof; that thereafter the then owners of the land herein described executed the required stock subscription contract with said association.

VI

That thereafter and before the owners of the land herein described could procure water for the irrigation of said land from the irrigation system so constructed by the United States as aforesaid, it was necessary that they make, execute, and deliver to the United States water-right applications for water to be used upon and in the irrigation of their land; that the then owners of the land herein described, relying upon the statements and representations herein alleged and set forth, executed a water-right applications, copies of which are hereto attached, marked "Exhibits B, C, and D", and made a part hereof; that by the terms of said water-right applications said owners contracted and agreed to pay to the United States for the water so made available for the irrigation of their lands the sum per irrigable acre that was fixed and announced by the then Secretary of the Interior by public notice, to wit: $52.00 per acre.

VII

That John W. Warrell and Inez L. Warrell, his wife, were at the time of the execution of the water-right application, marked "Exhibit B", the owners in fee simple of the land therein described; that Elwood E. Dwinell and May E. Dwinell were at the time of the execution of the water-right application marked "Exhibit C" the owners of the land therein described; that Elizabeth H. Hoover was the owner in fee simple of the land described in Exhibit D at the time of the execution thereof; that each of said applicants were bona fide residents of said respective tracts; that they acted for and on behalf of themselves and not at the instance or request of any other person, association, or corporation, either directly or indirectly; that they, and each of them, were fully qualified under the Reclamation Act and acts amendatory thereof and supplementary thereto
5 acquire a water right on a Federal reclamation project; that they, and each of them, did make said water-right applications to purchase from the United States pursuant to the terms of said Reclamation Act a water right for said land and agreed to pay for said water right the sum of $52.00 per acre; that thereafter the plaintiff acquired all right, title, and interest of said applicants in

and to said lands and water rights; that the plaintiffs and their predecessors in title have complied with all the requirements of the United States relative to the acquisition of the water right in said project and have paid all construction charges and operating and maintenance charges that have heretofore accrued.

VIII

That by the terms of the reclamation act and acts amendatory and supplemental thereto the Secretary of the Interior is charged with the administration thereof; that for a period of more than twenty years after the execution of the aforesaid water-right application the representatives and subordinates of the then Secretaries of the Interior and their representatives and subordinates, uniformly construed said acts of Congress and said contracts as requiring the delivery to said land of such amount of water that was necessary to beneficially and successfully irrigate the same, which said amount for a period of more than twenty years was actually determined by the representatives and subordinates of the Secretary of the Interior by going upon said land from time to time and from a factual investigation as to the water requirements of various crops growing on, or to be planted upon said land, the condition of the soil climatic conditions and other facts, which said representatives and subordinates obtained upon said personal investigation and examination, made a determination of the amount of water necessary to successfully and beneficially irrigate said land during all times during each irrigation season from the date of said water-right application in 1912 until about August 17th, 1934, the then Secretaries of the Interior and their representatives and subordinates, save and except two years of extreme water shortage, actually delivered to said land the amount of water so determined to be necessary to beneficially and successfully irrigate the same and the crops growing thereon, which said amount fluctuated from year to year, depending upon crop requirements and climatic conditions; that the amount of water so determined to be necessary by the representatives and subordinates of the Secretaries of the Interior to beneficially and successfully irrigate said land and the amount actually delivered each year to said land on an average for more than fifteen years was about 4.84 acre-feet per acre per annum, measured at the land and which amount was beneficially used on said land without waste to irrigate the same.

IX

That the reclamation act under and pursuant to which the then Secretary of the Interior authorized the purchase of the Sun-
6 nyside Canal and the building and construction of the reservoirs and distribution system and under and by virtue of which contracts herein referred to were executed and which became a part of each of said contracts gives the following measure of a water right for said land, to wit:

"That the right to the use of water acquired under the provisions of this act shall be appurtenant to the land irrigated and beneficial use shall be the basis, the measure, and the limit of the right."
that the contract between the then Secretary of the Interior acting for the United States and the Sunnyside Water Users Association herein referred to expressly provides:

"That in all the relations between the United States and this association and the members of the association, the rights of the members of the association to the use of water where the same have vested, are to be defined, determined, and enjoyed in accordance with the provisions of the said act of Congress and of other acts of Congress on the subject to the acquisition and enjoyment of the rights to use water, and also by the laws of the State of Washington, where not inconsistent therewith, modified, if modified at all, by the provisions of the articles of incorporation and bylaws of said association"; that under the decisions of the Supreme Court of the State of Washington where water is beneficially used upon lands for irrigation purposes, the same becomes appurtenant to the land on which the water is so used and said water cannot be diverted from said land without the consent of the owner thereof, and said water right is real estate.

X

That the plaintiff and his predecessors in title to said land and water right relying upon the statements and representations as herein alleged, made by the then Secretary of the Interior, his representatives and subordinates and the determination made by the Secretaries of the Interior, their representatives and subordinates as to the amount of water actually necessary to successfully and beneficially irrigate said land over a term of years and the actual delivery by said representatives and subordinates of the Secretaries of the Interior of the amount of water so determined to be necessary to successfully irrigate said land, joined with other water users in said Sunnyside unit in 1918, in the organization and incorporation of the Sunnyside Valley Irrigation District, and authorized said district to enter into contract with the United States of America, by the terms of which, the land herein described was bound to pay the charges of all other land in said unit and in said district in the event the owner thereof did not pay to the extent of $2,000,000.00.

XI

That in the practical administration of said project the Secretaries of the Interior, their representatives and subordinates have for a period of fifteen years consistently construed the reclamation act and said water-right application and the contract with the Sunnyside Water Users Association to require the delivery to said
7 land herein described of that amount of water during the irrigation season which was necessary to beneficially and successfully irrigate said land and actually determined from a factual

investigation from time to time during said period that on an average 4.84 acre-feet of water per acre per annum, measured at the land was necessary to beneficially and successfully irrigate the same, and in the operation of said project have consistently for a period of more than fifteen years actually delivered the amount of water so determined to be necessary to beneficially irrigate said land without requiring any additional payment on account of construction and at all times prior to the acts of the defendants, his representatives and subordinates as herein alleged have so construed the plaintiffs' rights with reference to water to irrigate said land that they were entitled to have delivered thereto, a sufficient amount of water to beneficially and successfully irrigate the same at all times during the irrigation season, save and except years of extreme water shortage when said land was delivered the amount of water available.

XII

That the defendant made an order and ruling that unless the plaintiff signed a contract to pay rental for all water in excess of three acre-feet, that no water above said amount would be permitted to flow on their land, and that the same would be diverted, and notified the plaintiff that unless he signed the water rental application for water in excess of three acre-feet per acre per annum, measured at the land, in the words and figures following, to wit:

"WATER RENTAL APPLICATION

"The undersigned applicant requests excess water under public notice issued by the Secretary February 19, 1932, and agrees to pay applicable charges, with 6% interest from December 1, 1934, until paid. He further agrees that water may be withheld from his land after 1934 until such charges are paid. It is understood that advance payment will be required in 1935 if the 1934 rental charge remains unpaid at that time.

"Witness: "Water user:

_____. _____."

that no water in excess of three acre-feet per acre per annum would be delivered to the land herein described; that the head gates would be shut down to the land herein described to three acre-feet per acre per annum, measured at the land; that the defendant, as Secretary of the Interior of the United States, his representatives and subordinates acting under his direction, contrary to the terms of the reclamation act herein referred to, contrary to the terms of the contract between the Sunnyside Water Users' Association and the United States herein referred to, contrary to the plain wording of said act of Congress, contract with the Sunnyside Water Users' Association and water-right applications, contrary to the practical construction of said act of Congress and contracts by the then Secretaries of the Interior, his representatives and subordinates, acting under his direction and with his knowledge and consent, for a period of

8 more than fifteen years; that said land was entitled to the amount of water that could be beneficially used thereon, contrary to the determination of the representatives and subordinates of the then Secretaries of the Interior as to the amount of water necessary to beneficially and successfully irrigate said land, and contrary to the decisions of the supreme court of the State of Washington that when water is beneficially used upon land it becomes appurtenant thereto and the title passes to the owner of the land, did on or about August 17th, 1934, shut off the supply of water from the land of the plaintiffs herein described in excess of three acre-feet per acre per annum, measured at the land; that at the time said head gates were so shut down ample water was available and in storage reservoirs and flowing in the Yakima River and in the Sunnyside Canal and laterals flowing therefrom to furnish said land and all other land within the Sunnyside unit of the Yakima project and to furnish all other lands entitled to receive water from said reservoirs and from the Yakima River to successfully and beneficially irrigate the same during the remainder of the irrigation season of 1934 and leave a surplus of 400,000 acre-feet unusued in said reservoirs.

III

That at the time said head gates were shut down on August 17th, 1934, the plaintiffs had a vested interest in a sufficient amount of water to beneficially and successfully irrigate said land which was appurtenant thereto; that said vested interest attached to said water as soon as it was impounded in storage reservoirs as herein alleged and when it was flowing in the Yakima River and Sunnyside Canal and irrigation system; that the plaintiffs were the owners of an easement in the said irrigation system necessary for the purpose of carrying said water, and the representatives and subordinates of the defendant, who were in charge of said irrigation system and who had charge of the delivery of the water in which plaintiffs had a vested interest, were at the time of the partial closing of said head gates as herein alleged performing a ministerial and executive duty in delivering said water to the plaintiff; that it was the executive and ministerial duty of said representatives and subordinates to keep said head gates open and to permit the amount of water necessary to beneficially and successfully irrigate plaintiffs' said land to flow thereon, and the defendant, by his acts as herein alleged, prevented said representatives and subordinates from performing that duty and tended to bring the United States into disrepute.

XIV

That the order and ruling requiring a new contract in the form of water-rental application to be entered into as hereinabove alleged and set forth and the acts of the defendants and his representatives and subordinates in shutting down the head gates to three acre-feet per acre per annum, measured at the land and diverting from plain-

tiff's land and not permitting to flow thereon, the remainder of the water in which he had a vested interest, were arbitrarily made and done and were not made in good faith and were made without regard to and in violation of the act of Congress aforesaid, the con-
9 tracts referred to herein, the practical construction of said act of Congress and contract between the then Secretaries of the Interior, their representatives and subordinates acting under their direction for a period of more than fifteen years and without regard to the determination made by the representatives and subordinates of the then Secretaries of the Interior as to the amount of water necessary to successfully and beneficially irrigate said land and the amount of water that was actually delivered to said land for a period of fifteen years prior to said date and without regard as to the amount of water actually available or necessary to beneficially and successfully irrigate said land and without regard to the decisions of the Supreme Court of the State of Washington to the effect that where water is beneficially used to irrigate land it becomes appurtenant thereto; that in making said ruling requiring said water-rental contract to be executed and in shutting down the head gates as aforesaid the defendant, his representatives, and his subordinates acting under his direction, failed to exercise an honest judgment and failed to exercise any judgment whatever and failed to exercise good faith and arbitrarily made said order and arbitrarily shut down said head gates for the express purposes and intent of coercing and forcing the plaintiff and other owners of land in the Sunnyside unit of the Yakima project and located within the Sunnyside Valley Irrigation District to authorize said district to enter into contract with the United States of America to purchase a supplemental water right for their said lands, including the land herein described, over and above the water rights theretofore purchased at a cost of $1,000,000.00 and binding the last faithful acre of land in said district and the land herein described to pay said sum, and all of said acts were contrary to the terms of and in violation of the terms of the reclamation act herein referred to and in violation of the terms of the contracts herein referred to and in violation of the practical determination by the representatives and subordinates of the Secretaries of the Interior over a period of fifteen years as to the amount of water necessary to successfully and beneficially irrigate said land or the amount that could be beneficially used thereon or the amount of water available for the irrigation thereof and were arbitrary and unreasonable and were not made or done in good faith and the effect of said acts by the defendant, his representative and subordinates, was to deprive the plaintiffs of a portion of the water that there were entitled to have delivered to said land and in violation of the vested rights of the plaintiffs.

XV

That said order and notice issued by the defendant and the requirements that the head gates to plaintiff's land be shut down to three acre-feet unless said water-rental application was executed as herein

alleged, was an attempt on the part of the defendant, his representatives, and subordinates to collect from the plaintiffs and other water users in the Sunnyside unit of the Yakima project the additional sum of $1,000,000.00 and also was an attempted evasion and violation of the express terms of the act of Congress passed and approved in 1914 (38 Stat. 687), which expressly provides that no increase in the construction charges shall hereafter be made after the same have been fixed by public notice, except by agreement between the Secretary of the Interior and a majority of the water-right applicants and entrymen to be affected by such increase; that the majority of the water-right applicants in the Sunnyside unit of the Yakima project and in said district and none of them ever consented to an increase in the construction charges.

XVI

That there was on August 17th, 1934, and has been at all times since said date, an ample supply of water available to furnish the plaintiff the water necessary to beneficially and successfully irrigate his said land and to beneficially and successfully irrigate all lands in the Sunnyside unit of the Yakima project and all other lands entitled to receive water from said storage reservoirs and from the Yakima River, and said water has been actually impounded in said storage reservoirs and a portion of which was diverted from the Yakima River and was flowing in the main Sunnyside Canal and laterals leading therefrom at the time the head gates were shut down as aforesaid.

XVII

That the defendant, Harold L. Ickes, as Secretary of the Interior, has threatened to continue to keep the head gates to plaintiff's land partially closed so that not to exceed three acre-feet per acre per annum will be permitted to flow thereon and has threatened to divert from said land the remainder of the water that plaintiffs are entitled to receive as herein alleged and has threatened to keep the head gates locked so that not more than three acre-feet of water per acre per annum will be permitted to flow thereon and to continue to keep said head gates locked and to divert and destroy the rest of the water unless plaintiffs will sign said water-rental contract or unless the owners of lands in said district will authorize it to enter into contract to pay the United States the sum of $1,000,000.00.

XVIII

That the threatened acts of Harold L. Ickes, Secretary of the Interior, his representatives and subordinates, to continue keeping the head gates closed so that not to exceed three acre-feet of water will flow on said land and diverting and destroying the remainder of the water belonging to the plaintiff is unwarranted, arbitrary, and illegal

and that if consummated it will deprive the plaintiffs of valuable property rights acquired in good faith by virtue of the reclamation act, contract with the Sunnyside Water Users' Association, practical construction of said act of Congress and contract by the then Secretaries of the Interior and their representatives and subordinates for a period of fifteen years as to the amount of water that plaintiffs and their predecessors in title were entitled to receive from said water supply and the amount necessary to beneficially and successfully irrigate said land and the amount of water delivered thereto and the rights acquired by the beneficial application of said water to said land for a period of more than twenty years, by virtue of
11 which, under the laws of the State of Washington, which are applicable, the title to the amount of water necessary to beneficially irrigate said land vested in the plaintiff; and, further, in that the said Harold L. Ickes, Secretary of the Interior, his representatives and subordinates, are without power or authority to set aside the practical construction by his predecessors in office, their representatives and subordinates, in the determination of the amount of water plaintiffs were entitled to receive under said act of Congress and said contracts and the plain wording of said act of Congress and said contract, and to nullify the decisions of the Supreme Court of the State of Washington to the effect that where water is beneficially used upon land it becomes appurtenant to the land the title vests in the owner of said land.

XIX

The plaintiffs have no plain, adequate, or complete remedy at law and effective relief can only be administered in a court of equity. The injury to plaintiff is not measurable in damages and is irreparable and cannot be compensated for in an action of law.

XX

That this suit arises under the Constitution and laws of the United States and involves the construction of the Constitution of the United States, acts of Congress, and the construction of contracts entered into by the United States of America; that the amount of the value of the matter in controversy herein between the plaintiff and the defendant exceeds the sum of $3,000.00, exclusive of interests and costs.

Wherefore, the plaintiffs pray:

1. That the process of this court issue directed to the defendant Harold L. Ickes, Secretary of the Interior, requiring him to appear and make answer to the foregoing bill of complaint, but not under oath, answer under oath being hereby expressly waived.

2. That upon the filing of this bill or at such time thereafter as shall be fixed by the court, a preliminary order may issue herein enjoining, pendente lite, the defendant, his successors in office, and

each and every and all persons claiming to act under his authority and control from diverting from plaintiffs' land any portion of the water owned by him and requiring the head gates to plaintiffs' land to be so adjusted that the amount of water owned by plaintiffs and which they are entitled to have flow on said land may flow thereon and requiring the defendant to desist from enforcing the orders heretofore issued by him requiring the execution of said water in excess of three acre-feet, and that upon the final determination of this action such injunction order be made perpetual and permanent.

3. That the plaintiff may have such other and further relief as the nature of the case may demand and require and may be agreeable to equity.

STEPHEN E. CHAFFEE,
Attorney for Plaintiffs.
PRESTON B. KAVANAGH,
P. C. KING, JR.,
Attorneys for Plaintiffs.

12 [*Duly sworn to by Mazina Z. Fox; jurat omitted in printing.*]

Exhibit A to complaint

CONTRACT BETWEEN THE SUNNYSIDE WATER USERS ASSOCIATION AND THE SECRETARY OF THE INTERIOR

These articles of agreement, made and entered into this 7th day of May 1906, by and between the United States of America, acting in this behalf by E. A. Hitchcock, Secretary of the Interior, party of the first part, and the Sunnyside Water Users Association, a corporation duly organized and existing under the laws of the State of Washington, party of the second part, their successors and assigns, witnesseth:

That whereas the Sunnyside Water Users Association is a corporation organized and existing under the laws of the State of Washington for the purposes mentioned in its articles of incorporation and bylaws, a copy of which is appended to this agreement and is, for every purpose of the interpretation, construction, and consideration of this agreement and of the rights of the parties hereunder, to be deemed, held, read, and considered as if fully written out or printed herein, and deemed a part hereof; and

Whereas the lands embraced within the area proposed to be irrigated as described in said articles of incorporation or bylaws are naturally desert and arid and incapable of proper cultivation without irrigation, and will to a greater or less extent remain unreclaimed, unfit for habitation, and uncultivation, in which condition they, or a great part thereof now are, unless the waters of the Yakima River in State of Washington and its tributaries be impounded and the flow thereof otherwise regulated and controlled; and

Whereas the Secretary of the Interior contemplates the construction of certain irrigation works under the provisions of an act of Congress entitled "An act appropriating the receipts from the sale and disposal of public lands in certain States and Territories to the construction of irrigation works for the reclamation of arid lands", approved June 17, 1902, for the irrigation and reclamation of the lands described in the said articles or bylaws; and

Whereas the incorporators and shareholders of said Sunnyside Water Users Association are, and under the provisions of its articles of incorporation and bylaws must be, owners and occupants
13 of lands in said area, and in some cases are appropriators of water for the irrigation thereof, and in addition thereto such incorporators and shareholders and their successors or assigns must initiate rights to the use of water from the said proposed irrigation works, to be constructed by the Secretary of the Interior as soon as such rights may be initiated, and thereafter complete the acquisition thereof in the manner and upon the terms and conditions to be prescribed therefor by the Secretary of the Interior, which rights shall be, and thereafter continue to be, forever appurtenant to designated lands owned by such shareholders; and

Whereas neither the relative priority nor the extent of the individual appropriations of such water heretofore made by said incorporators and shareholders for the lands described in said articles or bylaws, and which are now vested rights, have been ascertained or determined, but said incorporators and shareholders have agreed, among themselves, by the terms and provisions of said articles of incorporation and bylaws, upon the rules and principles by and upon which the relative priority and the extent of their several appropriations and vested rights to the use of such waters shall be determined:

Now, therefore, it is agreed and understood by and between the parties hereto—

1. That if the Secretary of the Interior shall authorize and cause the construction of said irrigation works, the said association will take prompt action to secure the determination by the courts of the relative rights of its shareholders to the use of water for said lands, and that in the determination of such rights and of their respective rights to the use of water acquired under said act of Congress the rules and principles set out in said articles of incorporation and bylaws, for such determination, shall be deemed the established rules and principles for that purpose.

2. That only those who are or who may become members of said association, under the provisions of its articles of incorporation and bylaws, shall be accepted as applicants for rights to the use of water available by means of said proposed irrigation works.

3. That the aggregate amount of such rights to be issued shall, in no event, exceed the number of acres of land capable of irrigation by the total amount of water available for the purposes being (1)

the amount now appropriated by the shareholders of the said association, and (2) the amount to be delivered from all sources in excess of the water now appropriated; and that the Secretary of the Interior shall determine the number of acres so capable of such irrigation as aforesaid, his determination to be made upon due and expert consideration of all available data, and to be based upon and measured and limited by the beneficial use of water.

4. That the payment for the water rights to be issued to the shareholders of said association, under the provisions of said act of Congress, shall be divided into not less than ten annual payments the first of which shall be payable when the water is first delivered from said works, or within a reasonable time thereafter, and after due notice thereof by the Secretary of the Interior to the association and that the cost of said proposed irrigation works shall be apportioned equally per acre among those acquiring such rights.

14 5. That the said water users' association hereby guarantees the payments for that part of the cost of the irrigation works which shall be apportioned by the Secretary of the Interior to its shareholders, and will promptly levy calls or assessments therefor and for the cost of maintenance and operation as may be assessed from year to year by the Secretary of the Interior and collect or require prompt payment thereof in such manner as the Secretary of the Interior may direct; that it will promptly pay the sums collected by it to the receiver of the local land office for the district in which said lands are situated; that it will promptly employ the means provided and authorized by the said articles of incorporation or bylaws for the enforcement of such collections, and will not change, alter, or amend its articles of incorporation or bylaws in any manner whereby such means of collection, or the lien given to it by the shareholders to secure the payment thereof, or of any assessments contemplated or authorized thereby, shall be impaired, diminished, or rendered less effective, without the consent of the Secretary of the Interior.

6. That the United States shall in no manner be responsible for the sums collected by said association until they have been paid into the hands of the receiver of the local land office, as provided by the law, and in accordance with such regulations as may be prescribed by the Secretary of the Interior.

7. That for the purpose of enforcing said collections the association will adopt and enforce proper bylaws, subject to the approval of the Secretary of the Interior, and not change them so as to in anywise impair their efficiency for said purpose, and will otherwise do any and all things it is authorized and empowered to do in the premises.

8. That the association will adopt and enforce such rules and regulations as it is authorized by its articles of incorporation and bylaws to adopt and enforce concerning the use of water by its

shareholders and concerning the administration of the affairs of the association to effectually carry out and promote the purposes of its organization, within the provisions of said articles of incorporation and bylaws, which rules and regulations shall be subject to the approval of the Secretary of the Interior, and that if the association fail to make and adopt such rules and regulations, then the Secretary of the Interior may prescribe them; but in such event the Secretary of the Interior shall impose no rule or regulation interfering with any vested right of the shareholders of the association as defined or modified by said articles of incorporation and bylaws.

9. That persons who are not now members of the association, but who may be the owners or occupants of land to be irrigated, as described in its articles of incorporation or bylaws, or of added lands as therein provided for and to whom rights to the use of water from the proposed irrigation works may be issued by the United States, may be, at the designation of the Secretary of the Interior, become members of the association upon subscribing to the stock thereof and upon compliance with the other conditions for such membership.

10. That in all the relations between the United States and this association and the members of the association the rights of the members of the association to the use of water where the same have vested are to be defined, determined, and enjoyed in accord-
15 ance with the provisions of the said act of Congress and of other acts of Congress on the subject of the acquisition and enjoyment of the rights to use water, and also by the laws of the State of Washington, where not inconsistent therewith, modified, if modified at all, by the provisions of the articles of incorporation and bylaws of said association.

11. That nothing contained in this agreement, or to be implied from the fact of its execution, shall be construed, held, or deemed to be an approval by the Secretary of the Interior, nor an adoption by him of the articles of incorporation or bylaws of said association in all their details as the form of organization of water users contemplated and authorized by section 6 of the said act of Congress of June 17, 1902, but such approval and adoption is expressly reserved until the conditions prescribed in said act authorizing such approval and adoption shall have arisen; and that when the Secretary of the Interior shall make, approve, and promulgate rules and regulations for the administration of the water to be supplied from said proposed irrigation works, such rules and regulations and such modifications thereof as the Secretary may from time to time approve and promulgate shall be deemed and held to be obligatory upon this association as fully and completely and to every intent and purpose as if they were now made, approved, promulgated, and written out in full in this agreement, and the same are to be so read and construed.

In witness whereof, the undersigned have hereunto subscribed their names and affixed their seals the day and year first herein written.

DEPARTMENT OF THE INTERIOR,
THOS. RYAN,
Secretary of the Interior, Acting for and on Behalf of the United States of America, Party of the First Part.
SUNNYSIDE WATER USERS ASSOCIATION,
By S. J. HARRISON, *President,*
Party of the Second Part.

Attest:

E. J. YOUNG, *Secretary,*
Sunnyside Water Users Association, Incorporated 1906,
Washington.

STATE OF WASHINGTON,
County of Yakima, ss:

Be it remembered, that on this 7th day of May 1906, before me, the undersigned, a notary public in and for said county and State, personally appeared S. J. Harrison and E. J. Young, to me personally known to be the president and secretary, respectively, of the corporation, to wit, Sunnyside Water Users Association, that executed the within and foregoing instrument, and acknowledged the said instrument to be the free and voluntary act and deed of said corporation, for the uses and purposes therein mentioned, and on oath stated that they were authorized to execute said instrument and that the seal affixed is the corporate seal of said corporation.

In witness whereof I have hereunto set my hand and affixed my official seal the day and year first above written.

WM. B. BRIDGMAN,
Notary Public for Washington, Residing at Sunnyside.

16 Form B. Approved Nov. 7, 1914. Printed 1914. 7–273.

Exhibit B to complaint

DEPARTMENT OF THE INTERIOR

WATER-RIGHT APPLICATION FOR LANDS IN PRIVATE OWNERSHIP

And lands other than homesteads under the reclamation act—Act June 17, 1902 (32 Stat. 388); and acts amendatory thereof and supplementary thereto—Yakima project. Serial No. 01211.

STATE OF WASHINGTON, SUNNYSIDE UNIT,
Sept. 21, 1915.
(Date)

We, John W. Warrell and Inez L. Warrell, husband and wife, in pursuance of the provisions of the reclamation act approved June 17, 1902 (32 Stat. 388), and acts amendatory thereof, and supplementary thereto, especially the act approved August 9, 1912 (37 Stat. 265), and the act approved August 13, 1914 (Public, No. 170), known

as the Reclamation Extension Act, all hereinafter called the reclamation law, and the rules and regulations established thereunder, do hereby apply on behalf of myself, my heirs, executors, administrators, and assigns, for a water right for the irrigation of and to be appurtenant to 10 acres of irrigable land as shown on plats approved by the Secretary of the Interior within the tract described as follows:

The north half of north half of northwest quarter of southeast quarter of section thirty-six, township nine, range twenty-two EW. meridian, containing a total of 10 acres.

2. The measure of the water right for said land is that quantity of water which shall be beneficially used for the irrigation thereof, but in no case exceeding the share proportionate to irrigable acreage, of the water supply actually available as determined by the project manager or other proper officer of the United States, or of its successors in the control of the project, during the irrigation season for the irrigation of lands under said unit. If measuring devices are not installed at the land, the amount of water delivered shall be determined by the Reclamation Service official in charge of the project a reasonable allowance being made for losses of water after passing the point of measurement.

3. I agree: (a) To pay the annual installments of the construction charge fixed by the Secretary of the Interior in public notice issued in connection with the unit above described on 27th day of July 1915, at $52.00 per acre of irrigable land, and in addition thereto the annual charges for operation and maintenance as prescribed by the Reclamation Extension Act; and all penalties which may accrue for failure to make payments at the proper time; (b) that the construction charge, and each and all of said annual charges for operation and maintenance with accrued penalties shall be and the same are hereby made a lien upon the tract of land above described and all
17 water rights now or hereafter appurtenant or belonging thereto and all improvements now existing or hereafter made thereon; promising, covenanting, and agreeing to pay all taxes and other claims now or hereafter becoming a prior encumbrance, failing which, upon demand by any proper officer of the United States, or its successors in control of said project, the United States or its said successors may pay the same and add the amount thereof to the lien hereby created and recover the amount so paid as part of the said lien.

4. Upon my failure to comply with the terms of the reclamation law, and the regulations thereunder, this application may, in the discretion of the Secretary of the Interior, be canceled by him with the forfeiture of all rights under the reclamation law and of all moneys theretofore paid hereon: Excepting, however, from the force and effect of this paragraph any and every failure to make payments which shall become due and payable after the issuance of final certificate for the water right hereby sought under the reclamation law, a

remedy for the failure thus excepted having been provided by said law.

5. This application must bear the certificate, as hereto attached, of the water users' association under said project, which has entered into contract with the Secretary of the Interior, and the liens which the United States holds against the above-described land for the payment of the construction, and the operation and maintenance charges, may be enforced, at the option of the United States, either directly by the United States or, where any such lien was given directly to the water users' association for the benefit of the United States, may be enforced through the medium of the water users' association; but the election of one remedy shall not preclude the United States from following the other. If the Secretary of the Interior has made no contract with a water users' association under said project, the applicant agrees to file, upon his direction, evidence of membership in the water users' association organized under the said project, in default of which this application shall be subject to cancelation by the Secretary of the Interior, with the forfeiture of all rights acquired thereunder and of all payments made thereon.

6. I further agree that the United States and its successors in charge of the said unit shall have full control over all ditches, gates, and other structures owned or controlled by the applicant or his successors in interest and which are required to deliver water hereunder, and proper officers and employees of the United States and its successors shall have at all times the right of access to the above-described premises whenever it is, in the judgment of the officer or employee in charge of said unit, necessary for them in the discharge of their duties of distributing water to exercise said control. And I do hereby give, grant, bargain, sell, and convey to the United States and its said successors the right for any such proper officer or employee to go and come upon any and all lands now or hereafter owned or held by me or them for said purpose and there exercise said control.

7. It is understood and agreed that the United States reserves the right upon my failure or the failure of my successors in interest to keep and perform any of the provisions in this instrument contained, by me and my successors in interest undertaken to be kept and
18 performed, to refuse to deliver water to said lands or to stop the delivery of water thereto if water is being delivered, and such refusal to deliver or stoppage of delivery of water shall not operate to cancel this application but shall be considered as an additional remedy to the United States to any remedies existing by reason of the provisions of this application or otherwise.

8. And I do hereby grant, bargain, sell, convey, and confirm to the United States of America and its successors in charge of the project, all right-of-way for ditches, canals, flumes, pipe lines, telegraph and telephone transmission lines, or other structures, now

constructed by or under the authority of the United States for or in connection with the said project, and all rights-of-way that may be or become necessary and suitable, and that may be required for the prosecution and operation of said project, and for the construction, maintenance, and operation of ditches, canals, flumes, pipe lines, telegraph and telephone transmission lines, or other structures that may be constructed by or under authority of the United States and its successors in charge of the project for and in connection with said project, to have and hold the same, together with all the tenements, hereditaments, privileges, and appurtenances thereunto belonging or in anywise appertaining to the United States of America and its assigns and successors in charge of the project forever, subject notwithstanding to the conditions upon which this application is made.

9. No Member of or Delegate to Congress, or Resident Commissioner, after his election or appointment or either before or after he has qualified and during his continuance in office, shall be admitted to any share or part of this contract or agreement, or to any benefit to arise thereupon. Nothing, however, herein contained shall be construed to extend to any incorporated company, where such contract or agreement is made for the general benefit of such corporation or company, as provided in section 116 of the act of Congress approved March 4, 1909 (35 Stat. 1109).

10. And I, the said John W. Warrell, being duly sworn, depose and say that my post-office address is Toppenish, Wash.; that I am a bona fide resident upon said land (or occupant thereof, residing in the neighborhood, namely, upon section 10, township 10, range 20, E. W. meridian, a distance in a direct line of 17 miles therefrom); that I hold the following interest in the said tract: Deed, as duly shown upon the records of Yakima County, Wash., in volume (liber) 120 at page (folio) 45; that no other application, now uncancelled, has been made for a water right under the reclamation law, appurtenant to land now owned or claimed by me, except as follows:

Application no. ------, ---------- project, of ---------- for ------ section --, township --, range --, -------- meridian, an area of ---- acres and containing ---- acres of irrigable land, as determined by the Secretary of the Interior; and that the present application is made in my own behalf and not at the instance or for the benefit of any other person or any association or corporation, either directly or indirectly.

11. Nothing in this application contained shall be construed as in any manner or at all abridging, limiting, or depriving the
19 United States of any means of enforcing any remedy in law or equity for the breach of any of the provisions of this application which it would otherwise have.

In witness whereof, we, John W. Warrell and Inez L. Warrell, his wife, have hereunto set our hand and seal this 19th day of October 1915.

[SEAL] JOHN W. WARRELL.
[SEAL] INEZ L. WARRELL.

In presence of
(Three witnesses must sign here:)
J. H. IMMEL.
JOHN SCHANG.
H. G. RIDEOUT.

Form B approved Nov. 7, 1914. Printed 1914. 7-273.

Exhibit C to complaint

DEPARTMENT OF THE INTERIOR

WATER-RIGHT APPLICATION FOR LANDS IN PRIVATE OWNERSHIP

And lands other than homestead under the reclamation act—Act June 17, 1902 (32 Stat. 388); and acts amendatory thereof and supplementary thereto—Yakima project. Serial No. 01219.

STATE OF WASHINGTON, SUNNYSIDE UNIT,
November 16, 1915.

1. I, Elwood E. Dwinell and May M. Dwinell, in pursuance of the provisions of the Reclamation Act approved June 17, 1902 (32 Stat. 388), and acts amendatory thereof and supplementary thereto, especially the act approved August 9, 1912 (37 Stat. 265)), and the act approved August 13, 1914 (Public, No. 170), known as the "Reclamation Extension Act", all hereinafter called the "reclamation law", and the rules and regulations established thereunder, do hereby apply on behalf of myself, my heirs, executors, administrators, and assigns, for a water right for the irrigation of and to be appurtenant to 10 acres of irrigable land as shown on plats approved by the Secretary of the Interior within the tract described as follows:

The south half of the north half of the northwest quarter of the southeast quarter ($S\frac{1}{2}N\frac{1}{2}NW\frac{1}{4}SE\frac{1}{4}$) of section thirty-six (36), section —, township nine (9) north, range twenty-two (22), E. W. meridian, containing a total of 10 acres.

2. The measure of the water right for said land is that quantity of water which shall be beneficially used for the irrigation thereof, but in no case exceeding the share proportionate to irrigable acreage, of the water supply actually available as determined by the project manager or other proper officer of the United States, or of its successors in the control of the project, during the irrigation season for the irrigation of lands under said unit. If measuring devices are not installed at the land, the amount of water delivered shall be determined by the Reclamation Service official in charge of the project, a reasonable allowance being made for losses of water after passing the point of measurement.

3. I agree: (a) To pay the annual installments of the construction charge fixed by the Secretary of the Interior in public notice issued in connection with the unit above described on 27th day of July 1915 at $52.00 per acre of irrigable land, and in addition thereto the annual charges for operation and maintenance as prescribed by the Reclamation Extension Act; and all penalties which may accrue for failure to make payments at the proper time; (b) that the construction charge, and each and all of said annual charges for operation and maintenance with accrued penalties shall be and the same are hereby made a lien upon the tract of land above described and all water rights now or hereafter appurtenant or belonging thereto and all improvements now existing or hereafter made thereon; promising, covenanting, and agreeing to pay all taxes and other claims now or hereafter becoming a prior encumbrance, failing which, upon demand by any proper officer of the United States, or its successors in control of said project, the United States or its said successors may pay the same and add the amount thereof to the lien hereby created and recover the amount so paid as part of the said lien.

4. Upon my failure to comply with the terms of the reclamation law, and the regulations thereunder, this application may, in the discretion of the Secretary of the Interior, be canceled by him with the forfeiture of all rights under the reclamation law and of all moneys theretofore paid hereon: Excepting, however, from the force and effect of this paragraph any and every failure to make payments which shall become due and payable after the issuance of final certificate for the water right hereby sought under the reclamation law, a remedy for the failure thus excepted having been provided by said law.

5. This application must bear the certificate, as hereto attached, of the water users' association under said project, which has entered into contract with the Secretary of the Interior, and the liens which the United States holds against the above-described land for the payment of the construction, and the operation and maintenance charges, may be enforced, at the option of the United States, either directly by the United States or, where any such lien was given directly to the water users' association for the benefit of the United States, may be enforced through the medium of the water users' association; but the election of one remedy shall not preclude the United States from following the other. If the Secretary of the Interior has made no contract with a water users' association under said project, the applicant agrees to file, upon his direction, evidence of membership in the water users' association organized under the said project, in default of which this application shall be subject to cancellation by the Secretary of the Interior, with the forfeiture of all rights acquired thereunder and of all payments made thereon.

6. I further agree that the United States and its successors in charge of the said unit shall have full control over all ditches, gates, and other structures owned or controlled by the applicant or his successors in interest and which are required to deliver water hereunder,

and proper officers and employees of the United States and its successors shall have at all times the right of access to the above-described premises whenever it is, in the judgment of the officer or
21 employee in charge of said unit, necessary for them in the discharge of their duties of distributing water to exercise said control. And I do hereby give, grant, bargain, sell, and convey to the United States and its said successors the right for any such proper officer or employee to go and come upon any and all lands now or hereafter owned or held by me or them for said purpose and there exercise said control.

7. It is understood and agreed that the United States reserves the right upon my failure or the failure of my successors in interest to keep and perform any of the provisions in this instrument contained, by me and my successors in interest undertaken to be kept and performed, to refuse to deliver water to said lands or to stop the delivery of water thereto if water is being delivered, and such refusal to deliver or stoppage of delivery of water shall not operate to cancel this application but shall be considered as an additional remedy to the United States to any remedies existing by reason of the provisions of this application or otherwise.

8. And I do hereby grant, bargain, sell, convey, and confirm to the United States of America and its successors in charge of the project all rights-of-way for ditches, canals, flumes, pipe lines, telegraph and telephone transmission lines, or other structures, now constructed by or under the authority of the United States for or in connection with the said project, and all rights-of-way that may be or become necessary and suitable, and that may be required for the prosecution and operation of the said project, and for the construction, maintenance, and operation of ditches, canals, flumes, pipe lines, telegraph and telephone transmission lines, or other structures that may be constructed by or under authority of the United States and its successors in charge of the project for and in connection with said project, to have and hold the same, together with all the tenements, hereditaments, privileges, and appurtenances thereunto belonging or in anywise appertaining to the United States of America and its assigns and successors in charge of the project forever, subject notwithstanding to the conditions upon which this application is made.

9. No Member of or Delegate to Congress, or Resident Commissioner, after his election or appointment or either before or after he has qualified and during his continuance in office, shall be admitted to any share or part of this contract or agreement, or to any benefit to arise thereupon. Nothing, however, herein contained shall be construed to extend to any incorporated company, where such contract or agreement is made for the general benefit of such corporation or company, as provided in section 116 of the act of Congress approved March 4, 1909 (35 Stat. 1109).

10. And I, the said Elwood E. Dwinell, being duly sworn, depose any say that my post-office address is Mabton, Wash.; that I am an

occupant thereof, residing in the neighborhood, namely, in Mabton, Wash., meridian, a distance in a direct line of 5 miles therefrom; that I hold the following interest in the said tract: Fee simple as duly shown upon the records of Yakima County, Wash., in volume (liber) 160, at page (folio) 424; that no other application, now uncancelled, has been made for a water right under the reclamation law, appurtenant to land now owned or claimed by me, except as follows:

22 Application no. 0449, Yakima project of Elwood E. Dwinell for lot 3, block 23, Phillips 4th add., section 31, township 9, range 23 E., W., to Mabton meridian, an area of —— acres and containing 1 acre of irrigable land, as determined by the Secretary of the Interior; and that the present application is made in my own behalf and not at the instance or for the benefit of any other person or any association or corporation, either directly or indirectly.

11. Nothing in this application contained shall be construed as in any manner or at all abridging, limiting, or depriving the United States of any means of enforcing any remedy in law or equity for the breach of any of the provisions of this application which it would otherwise have.

In witness whereof, we, Elwood E. Dwinell & May M. Dwinell, have hereunto set our hands and seals this 23rd day of Dec. 1915.

[SEAL] ELWOOD E. DWINELL.
[SEAL] MAY M. DWINELL.

In presence of (three witnesses must sign here)—

T. W. HOWELL.
C. W. GILBREATH.
J. V. KELLEY.

Form B approved Nov. 7, 1914. Printed 1915. 7–273.

Exhibit D to complaint

DEPARTMENT OF THE INTERIOR

WATER-RIGHT APPLICATION FOR LANDS IN PRIVATE OWNERSHIP

And lands other than homesteads under the reclamation act—Act June 17, 1902 (32 Stat. 388); and acts amendatory thereof and supplementary thereto—Yakima project. Serial No. 01329.

STATE OF WASHINGTON, SUNNYSIDE UNIT,

May 11, 1917.
(Date)

1. I, Elizabeth H. Hoover, in pursuance of the provisions of the Reclamation Act approved June 17, 1902 (32 Stat. 388), and acts amendatory thereof and supplementary thereto, especially the act approved August 9, 1912 (37 Stat. 265), and the act approved August 13, 1914 (38 Stat. 686), known as the "Reclamation Extension Act", all hereinafter called the "Reclamation Law", and the rules and regulations established thereunder, do hereby apply on behalf of myself,

my heirs, executors, administrators, and assigns for a water right for the irrigation of and to be appurtenant to 49 acres of irrigable land as shown on plats approved by the Secretary of the Interior within the tract described as follows:

South half northeast quarter (S½NE¼) section 36, township 9 N., range 22 E., W. meridian, containing a total of 49 acres.

2. The measure of the water right for said land is that quantity of water which shall be beneficially used for the irrigation
23 thereof, but in no case exceeding the share proportionate to irrigable acreage, of the water supply actually available as determined by the project manager or other proper officer of the United States, or of its successors in the control of the project, during the irrigation season for the irrigation of lands under said unit. If measuring devices are not installed at the land, the amount of water delivered shall be determined by the Reclamation Service official in charge of the project, a reasonable allowance being made for losses of water after passing the point of measurement.

3. I agree: (a) To pay the annual installments of the construction charge fixed by the Secretary of the Interior in public notice issued in connection with the unit above described on * 16th day of June 1913, at $57.20 per acre of irrigable land, and in addition thereto the annual charges for operation and maintenance as prescribed by the Reclamation Extension Act, and all penalties which may accrue for failure to make payments at the proper time; (b) that the construction charge and each and all of said annual charges for operation and maintenance with accrued penalties shall be and the same are hereby made a lien upon the tract of land above described and all water rights now or hereafter appurtenant or belonging thereto and all improvements now existing or hereafter made thereon, promising, covenanting, and agreeing to pay all taxes and other claims now or hereafter becoming a prior encumbrance, failing which, upon demand by any proper officer of the United States, or its successors in control of said project, the United States or its said successors may pay the same and add the amount thereof to the lien hereby created and recover the amount so paid as part of the said lien.

4. Upon my failure to comply with the terms of the reclamation law and, the regulations thereunder, this application may, in the discretion of the Secretary of the Interior, be canceled by him with the forfeiture of all rights under the reclamation law and of all moneys theretofore paid hereon: Excepting, however, from the force and effect of this paragraph, any and every failure to make payments which shall become due and payable after the issuance of final certificate for the water right hereby sought under the reclamation law, a remedy for the failure thus excepted having been provided by said law.

5. This application must bear the certificate, as hereto attached, of the water users' association under said project, which has entered

* 49 acres opened in 1913.

into contract with the Secretary of the Interior, and the liens which the United States holds aganist the above-described land for the payment of the construction, and the operation and maintenance charges, may be enforced, at the option of the United States, either directly by the United States or, where any such lien was given directly to the water users' association for the benefit of the United States, may be enforced through the medium of the water users' association; but the election of one remedy shall not preclude the United States from following the other. If the Secretary of the Interior has made no contract with a water users' association under said project, the applicant agrees to file, upon his direction, evidence of membership in the water users' association organized under the said project, in default of which this application shall be sub-
24 ject to cancelation by the Secretary of the Interior, with the forfeiture of all rights acquired thereunder and of all payments made thereon.

6. I further agree that the United States and its successors in charge of the said unit shall have full control over all ditches, gates, and other structures owned or controlled by the applicant or his successors in interest and which are required to deliver water hereunder, and proper offices and employees of the United States and its successors shall have at all times the right of access to the above-described premises whenever it is, in the judgment of the officer or employee in charge of said unit, necessary for them in the discharge of their duties of distributing water to exercise said control. And I do hereby give, grant, bargain, sell, and convey to the United States and its said successors the right for any such proper officer or employee to go and come upon any and all lands now or hereafter owned or held by me or them for said purpose and there exercise said control.

7. It is understood and agreed that the United States reserves the right upon my failure or the failure of my successors in interest to keep and perform any of the provisions in this instrument contained, by me and my successors in interest undertaken to be kept and performed, to refuse to deliver water to said lands or to stop the delivery of water thereto if water is being delivered, and such refusal to deliver or stoppage of delivery of water shall not operate to cancel this application, but shall be considered as an additional remedy to the United States to any remedies existing by reason of the provisions of this application or otherwise.

8. And I do hereby grant, bargain, sell, convey, and confirm to the United States of America and its successors in charge of the project all rights-of-way for ditches, canals, flumes, pipe lines, telegraph and telephone transmission lines, or other structures now constructed by or under the authority of the United States for or in connection with the said project, and all rights-of-way that may be or become necessary and suitable and that may be required for the prosecution and operation of the said project, and for the construction, maintenance, and operation of ditches, canals, flumes, pipe

lines, telegraph and telephone transmission lines, or other structures that may be constructed by or under authority of the United States and its successors in charge of the project for and in connection with said project, to have and hold the same, together with all the tenements, hereditaments, privileges, and appurtenances thereunto belonging or in anywise appertaining to the United States of America and its assigns and successors in charge of the project forever, subject notwithstanding to the conditions upon which this application is made.

9. No Member of or Delegate to Congress, or Resident Commissioner, after his election or appointment or either before or after he has qualified and during his continuance in office, shall be admitted to any share or part of this contract or agreement, or to any benefit to arise thereupon. Nothing, however, herein contained shall be construed to extend to any incorporated company, where such contract or agreement is made for the general benefit of such corporation or company, as provided in section 116 of the act of Congress approved March 4, 1909 (35 Stat. 1109).

10. And I, the said Elizabeth H. Hoover, being duly sworn, depose and say that my post-office address is Mabton, Washington; that I am a bona fide resident upon said land (or occupant thereof, residing in the neighborhood, namely, upon section 7, township 8 N., range 23, _____ meridian, a distance in a direct line of 2 miles therefrom); that I hold the following interest in the said tract: Fee simple as duly shown upon the records of _____ County, _____, in volume (liber) _____, at page (folio) ____; that no other application, now uncanceled, has been made for a water right under the reclamation law, appurtenant to land now owned or claimed by me, except as follows:

Application no. ____, Yakima-Sunnyside project, of Washington, for E½ SE¼ NW¼ section 8, township 23 N., range 7, _____ meridian, an area of 55 acres and containing 55 acres of irrigable land, as determined by the Secretary of the Interior; and that the present application is made in my own behalf and not at the instance or for the benefit of any other person or any association or corporation, either directly or indirectly.

11. Nothing in this application contained shall be construed as in any manner or at all abridging, limiting, or depriving the United States of any means of enforcing any remedy in law or equity for the breach of any of the provisions of this application which it would otherwise have.

In witness whereof I, Elizabeth H. Hoover, have hereunto set my hand and seal this 18th day of May 1917.

[SEAL] ELIZABETH H. HOOVER.

In presence of

(Three witnesses must sign here:)

E. S. TUTTLE.

G. E. RODMAN.

JANET NAGLE.

In Supreme Court of District of Columbia

Order permitting amendment

Filed January 2, 1935

* * * * * * *

Upon consideration of the plaintiffs' motion made in open court and it appearing that the defendant, through his attorney, consents thereto, it is this 2d day of January 1935,

Ordered, adjudged, and decreed that the plaintiffs be, and they hereby are, permitted to file an amendment to the bill of complaint heretofore filed by them in the above-described cause.

JESSE C. ADKINS,
Justice.

The foregoing order is hereby consented to this 27th day of December 1934.

J. KENNARD CHEADLE,
Attorney for Defendant.

26 In Supreme Court of District of Columbia

Amendment to bill of complaint

Filed January 2, 1935

* * * * * * *

Comes now the plaintiffs, by their attorneys, and having obtained leave of this court therefor, amend the bill of complaint filed by them herein, as follows:

I

At the end of paragraph XVI of the bill of complaint, add the following:

"That three acre-feet of water per acre is not now, never has been, and will not in the future be sufficient to beneficially irrigate the land belonging to the plaintiffs herein."

II

Insert the following paragraph in lieu of paragraph XIX of the bill of complaint:

"That a maximum of three acre-feet of water per acre furnished the land of plaintiffs would enable them to beneficially irrigate about one-half of their said land, leaving the other one-half thereof barren and nonproductive, thereby forcing one-half of the land belonging to plaintiffs to bear the construction and maintenance charges for the whole tract of land. That if plaintiffs attempted to spread a maximum of three acre-feet of water per acre over the whole tract

of land belonging to them, they would not have sufficient water to grow any profitable crop and their land would be completely destroyed for farming purposes, causing them to suffer irreparable loss and damage which could not be compensated for in an action at law, and plaintiffs have no adequate and complete remedy at law and effective relief can only be administered in a court of equity."

MAZINA FOX.
JOSIE R. FOX.

STEPHEN E. CHAFFEE.
P. C. KING, Jr.
PRESTON B. KAVANAGH.
[*Duly sworn to by Mazina Fox and J. R. Fox; jurat omitted in printing.*]

27 In Supreme Court of District of Columbia

Motion to dismiss

Filed February 8, 1935

* * * * * * *

Comes now Harold L. Ickes, Secretary of the Interior, the defendant in the above-entitled cause, and moves to dismiss the above-entitled cause and the plaintiff's amended bill of complaint in said cause upon each and every of the following grounds:

1. That the defendant has no individual interest in the controversy, and the relief sought against him is in his official capacity only, as a representative of the Government, which alone is to be affected by any decree herein, wherefore this suit, as manifest upon the face of the amended bill of complaint, is essentially and substantially a suit against the United States, beyond the jurisdiction of the court.

2. That the amended bill of complaint and the exhibits attached thereto and made a part thereof show that this suit is brought on contracts to which the United States is a party and that the decree prayed for would affect the interest of the United States in said contracts and the property of the United States, whereof the court is without jurisdiction.

3. That it is manifest, upon the face of the amended bill of complaint, that the plaintiffs seek, in substance and effect, a decree for specific performance by the United States of alleged obligations under its contracts, whereof the court is without jurisdiction.

4. That it appears by the amended bill of complaint that the plaintiffs have a plain, adequate, and complete remedy at law, if they have any right.

5. That it is manifest, upon the face of the amended bill of complaint, that the relief prayed for therein would necessarily involve continued and detailed supervision by this Court, for a long and indefinite period, of the performance of contract duties that require

the exercise of personal judgment and technical skill, wherefore said bill lacks equity.

Wherefore, the defendant, Harold L. Ickes, Secretary of the Interior, prays that the above-entitled cause be dismissed, that the amended bill of complaint in said cause be dismissed, and that he be permitted to go hence without day, be for nothing held, and recover of the plaintiffs his costs.

NATHAN R. MARGOLD,
Solicitor, Department of the Interior,
CHARLES FAHY,
First Assistant Solicitor, Department of the Interior,
J. KENNARD CHEADLE,
Assistant Solicitor, Department of the Interior,
HOWARD R. STINSON,
Assistant Solicitor, Department of the Interior,
Attorneys for defendant.

Service of above motion acknowledged this 8th day of February 1935.

P. C. KING, Jr.,
Attorney for plaintiff.

28 In Supreme Court of District of Columbia

Memorandum opinion

Filed April 1, 1935

* * * * * * *

In each of these cases the bill seeks to compel the defendant to carry out an executors contract of the United States. I think that the cases of *Boeing Air Transport, Inc.*, v. *Farley*, and *Wells* v. *Roper* are controlling. The defendant, as Secretary of the Interior, is in control of the irrigation project and the effect of granting to the plaintiffs the relief sought would be to specifically enforce contracts of the United States.

The bills will be dismissed with costs.

BAILEY, *J.*

In Supreme Court of District of Columbia

Order dismissing bill as amended, &c.

Filed April 19, 1935

* * * * * * *

The above-entitled cause having come on to be heard the 29th day of March 1935 on the defendant's motion to dismiss for lack of jurisdiction in this court to entertain said cause; and at said time the parties thereto having appeared in open court by their respective attorneys and the arguments of said attorneys having been heard,

the matter having been submitted and taken under advisement by this court, and the same having been carefully considered, the court being fully advised in the premises: it is hereby,

Ordered, adjudged, and decreed this 19th day of April 1935 that the defendant's motion to dismiss be and the same hereby is granted, and that the bill of complaint, as amended, filed herein be and the same hereby is dismissed, with leave to file, within fifteen days from the date hereof, a motion for leave to amend, accompanied by the proposed amended bill of complaint.

JENNINGS BAILEY,
Justice.

Consent as to form:
P. C. KING, Jr.,
Atty. for plaintiff.

In Supreme Court of District of Columbia

Motion for leave to amend

Filed April 29, 1935

* * * * * * *

Now come plaintiffs, pursuant to an order heretofore entered in this cause, on the 19th day of April, dismissing the bill of complaint then on file and giving the plaintiffs fifteen days to file a motion for leave to amend accompanied by the proposed amended bill of complaint, and move the court for leave to file the proposed amended bill of complaint attached to this motion, for reasons set forth in the memorandum of points and authorities filed in support of this motion.

STEPHEN E. CHAFFEE,
PRESTON B. KAVANAGH,
PRESTON C. KING, Jr.,
Attorneys for Plaintiffs.

29 In Supreme Court of District of Columbia

Memorandum opinion

Filed June 1, 1935

* * * * * * *

It appears from the proposed amended bills that the orders made by the defendant are not authorized by Congress, and had they been so authorized, would have deprived the plaintiffs of vested rights. The suits are not brought against the United States but to set aside unauthorized acts of the defendant in cases in which he has no discretionary powers, and is acting arbitrarily.

The motions for leave to file the amended bills will be granted.

BAILEY, *J.*

In Supreme Court of District of Columbia

Order granting motion for leave to amend, &c.

Filed June 3, 1935

* * * * * * *

The above-entitled cause having come on to be further heard on the plaintiffs' motion for leave to amend, said motion having been filed pursuant to leave granted in the order of this court, entered therein the 19th day of April 1935, dismissing the bill of complaint, as amended, theretofore filed therein; and the parties thereto having appeared in open court by their respective attorneys and the arguments of said attorneys on said motion having been heard, the matter having been submitted, and the court being fully advised in the premises; and having filed his opinion granting motions for leave to file amended complaints; it is hereby,

Ordered, adjudged, and decreed this 3rd day of June 1935, that the plaintiffs' motion for leave to amend be, and the same hereby is, granted and plaintiffs are permitted to file the proposed amended complaint.

It is further ordered that the defendant be required to further plead within the time prescribed by the rules of the court.

JENNINGS BAILEY, *Justice.*

O. K. as to form:

J. KENNARD CHEADLE,
One of Attorneys for Defendant.

In Supreme Court of District of Columbia

Amended bill of complaint

Filed June 4, 1935

* * * * * * *

To the Supreme Court of the District of Columbia, holding an equity court:

The plaintiffs by leave of the court first had and obtained, filed herein their amended bill of complaint and respectfully represent:

That they are citizens of the United States and of the State of Washington, residing near Mabton, in Yakima County, Washington, and that their post-office address is Mabton, Washington, and
30 that they bring this suit in their own right and on their own behalf against Harold L. Ickes, a citizen of Illinois, residing in the District of Columbia, and that they complain of the matters and things hereinafter set forth.

I

That the defendant is now and has been since, to wit: March 5th, 1933, the duly appointed, qualified, and acting Secretary of the Interior of the United States and as such has charge of the administration of the laws of the United States relating to irrigation and reclamation projects, constructed by the United States and particularly to the administration of the act of Congress, known as the reclamation act, being the act of June 17th, 1902 (32 Stat. 388), as amended and supplemented by later acts of Congress; but solely under and subject to the irrigation and appropriation laws of the State of Washington, and that said defendant is sued in his official capacity as such Secretary of the Interior as hereinafter set forth.

II

That in 1906 the then Secretary of the Interior approved an irrigation and reclamation project known as the "Sunnyside unit of the Yakima project" and on behalf of the United States purchased from the Washington Irrigation Company the Sunnyside Canal, water appropriations, and irrigation system used in connection therewith.

III

That the following-described real estate, to wit:

North half of the north half of the northwest quarter of the southwest quarter of section 36, township 9 north, range 22 E. W. M.;

The south half of the north half of the northwest quarter of the southeast quarter of section 36, township 9 north, range 22 E. W. M.;

South half of the northeast quarter of section 36, township 9 north, range 22 E. W. M.;

is situated within said Sunnyside unit of the Yakima project and also within the Sunnyside Valley Irrigation District, an irrigation district organized and existing under the laws of the State of Washington, and within Yakima County, Washington; that at the time of the purchase of said canal, water appropriations, and irrigation system said land was arid and unproductive and had no value but was susceptible to irrigation by gravity flow from said irrigation system; that said land when furnished with the amount of water necessary to beneficially irrigate the same, becomes very productive.

IV

That shortly after the purchase by the Secretary of the Interior for the United States of said canal, water appropriations, and irrigation system, and at the time of the construction of said project was contemplated and considered by the then Secretary of the

31 Interior, it was stated and represented by the then Secretary of the Interior, his representatives, and his subordinates that before the construction of the reservoirs and other works could be undertaken the owners of the land herein described and other land susceptible of irrigation by gravity flow from said system should cooperate with the then Secretary of the Interior to the extent of incorporating the Sunnyside Water Users' Association and placing their said lands in said project and agreeing to take water for the purpose of irrigating their said lands from said project, and also execute a stock subscription contract and water-right application for the purchase of water for said land; that the owners of the land herein described and other owners of land susceptible to irrigation by gravity flow from said irrigation system incorporated the Sunnyside Water Users' Association under the laws of the State of Washington; that thereafter a contract was entered into between said corporation and the United States, a copy of which is hereto attached, and made a part hereof, marked "Exhibit A."

V

That James Rudolph Garfield was Secretary of the Interior, and as Secretary of the Interior he ascertained the total cost of purchasing said irrigation system, additional construction cost of said system, and construction of necessary storage reservoirs of sufficient capacity to furnish said land and all other land in said unit with such an amount of water as was necessary to beneficially and successfully irrigate the same; that said Secretary of the Interior ascertained and determined that the total cost of said water right for said land would be $52.00 per acre, and that said sum would be sufficient to return to the reclamation fund the total cost of said project; that said Secretary of the Interior, pursuant to the terms of the reclamation act determined and fixed the construction charge for a water right for said land at $52.00 per acre; that said Secretary issued a public notice and order fixing the amount of construction charge to be paid by the owner of said land for the amount of water necessary to beneficially and successfully irrigate the same at $52.00 per acre; that said Secretary of the Interior issued a public notice and order fixing the cost of said irrigation system at $52.00 per acre for the land herein described, a copy of which said notice and order is hereto attached, made a part hereof, and marked "Exhibit B."

VI

That before the owner of the land herein described could procure water for the irrigation of said land from the irrigation system as aforesaid, it was necessary that they make, execute, and deliver to the United States water-right applications for water to be used in the irrigation of said land; that the then owners of the land herein

described executed a water-right application, a copy of which is hereto attached marked "Exhibit C" and made a part hereof; that the plaintiffs are husband and wife and the absolute owners of said land.

32

VII

That the successive Secretaries of the Interior from and after the time of the issuing of said public notice and order as herein alleged, their representatives and subordinates who were charged with and who actually administered said project, uniformly and at all times construed the Reclamation Act and contracts herein referred to; that the owners of the land herein described and the owners of all other lands in said unit had purchased a sufficient amount of water to beneficially and successfully irrigate their said land; and that the amount of water required for each tract to beneficially irrigate the same was to be determined by the representatives and subordinates of the Secretary of the Interior, who had the physical charge of the water distribution from a factual investigation made by said representatives and said subordinates by going upon the land from time to time, and from a personal examination of the same, the crops growing thereon, and the water requirements thereof. That pursuant to said practical construction made by the representatives and subordinates of the Secretary of the Interior, and in the method and manner aforesaid, it was determined by the successive Secretaries of the Interior, their representatives and their subordinates that 4.84 acre-feet of water per acre per annum was necessary to beneficially and successfully irrigate said land, that pursuant to said practical construction and determination the successive Secretaries of the Interior, their representatives, and their subordinates have for a period of more than twenty years delivered to said land the amount of water necessary to beneficially and successfully irrigate the same, which water has at all times been beneficially used thereon for irrigation purposes.

VIII

That the statute law of the State of Washington, Remington's Revised Statutes, section 7391, which was the law of the State of Washington at the time the water rights herein described were acquired, provides:

"The right to the use of water which has been applied to a beneficial use in the State shall be and remain appurtenant to the land or place upon which the same is used."

The decisions of the Supreme Court of the State of Washington uniformly hold that where water is beneficially used upon land for irrigation purposes, the water right so obtained shall be and remain appurtenant to the land where the same is used; that under and by virtue of said statute law and said decisions the absolute title in fee simple of 4.84 acre-feet of water per acre per annum became and is

now vested in the plaintiff and under the laws of the State of Washington, is real estate (in pencil) that plaintiffs are the owners of said land.

IX

That the United States completed the construction of the irrigation system in said unit and constructed reservoirs of sufficient capacity to beneficially and successfully irrigate all lands within said unit; that after all the costs of construction of said irrigation
33 system and the construction of reservoirs of sufficient capacity to beneficially and successfully irrigate said land had been ascertained, and after the determination had been made, that 4.84 acre-feet of water per acre per annum was necessary to beneficially and successfully irrigate said land had been ascertained, and after the determination had been made, that 4.84 acre-feet of water per acre per annum was necessary to beneficially and successfully irrigate the land herein described, and after said water had been delivered for several years, Congress passed an act providing that no increase of construction charges could be made after the same had been fixed by public notice and order except by agreement between the Secretary of the Interior and a majority of the water-right applicants; that on September 24th, 1914, the then Secretary of the Interior, Franklin K. Lane, issued a second public notice and order expressly providing that there would be no increase in the construction charges against the land herein described; a copy of said public notice is hereto attached, made a part hereof, and marked "Exhibit D."

X

That the plaintiffs and their predecessors in title have fully and in every particular complied with the terms of the reclamation act and all contracts in connection with said water right and have paid to the United States all sums that have accrued and become due on account of the construction charges and have also paid all operation and maintenance charges assessed against the same, and that on account thereof the plaintiffs have a vested interest in a water right sufficient to beneficially and successfully irrigate said land, to wit: 4.84 acre-feet of water per acre per annum; that said water right is appurtenant to the land herein described.

XI

That on or about the year 1930, Elwood Mead, Commissioner of Reclamation of the United States, wished to construct the Cle Elum Reservoir at a cost of $3,500,000.00, to store water for the purpose of irrigating lands in the Kittitas Reclamation District, the canal and distributing system in said district being in the process of construction at that time, and also for the purpose of furnishing water to irrigate lands in the Roza and Kennewick divisions of the Yakima project, the

construction of which were contemplated at that time; that said Mead ascertained the total cost of said reservoir was $1,000,000.00 more than the amount that would be returned to the reclamation fund from said divisions; that it was necessary to obtain said sum from some source before construction of the Cle Elum Reservoir could be commenced; that said Mead was desirous of constructing said reservoir and knew of no other source from which to obtain said sum except from the Sunnyside unit of the Yakima project; that said Mead, without consulting this plaintiff or other water users in said unit and said district, charged the sum of $1,000,000.00 to said unit and district, and furnished the Secretary of the Interior information that provision had been made for the payment by said unit of said sum.

34

XII

Thereafter B. E. Stoutemyer, district counsel, and other officials of the Bureau of Reclamation of the United States attempted to persuade the water-right applicants and water users in the Sunnyside unit and in the Sunnyside Valley Irrigation District to authorize the officials of the district to execute a contract with the United States to pay $1,000,000.00 additional construction charge and obligate the plaintiffs' land and all other lands in said district to the last faithful acre to pay said sum of $1,000,000.00 additional construction charges; that this plaintiff and no other water-right applicants or water users in said unit or said district ever agreed to said increase of construction charges and never agreed to pay the same; that the amount so attempted to be charged against the plaintiffs and other water-right applicants and water users in said district was equivalent to 35% of the original cost of the water right to the plaintiffs and 35% of the original cost to all other water-right applicants and water users in said district.

XIII

That on or about the 11th day of December 1930, Ray Lyman Wilbur, the then Secretary of the Interior, certified to the President of the United States that provision had been made for the repayment to the reclamation fund of the total cost of the Cle Elum Reservoir and that $1,000,000.00 of the cost of construction of said reservoir was to be obtained by rentals from the Sunnyside division of the Yakima project. A copy of this certificate is hereto attached and made a part hereof, marked "Exhibit E."

XIV

That thereafter said Elwood Mead and B. E. Stoutemyer agreed with Ray Lyman Wilbur, the then Secretary of the Interior, to force and coerce this plaintiff and other water-right applicants and water users in said unit and said district to authorize said district to enter into contract to pay the additional sum of $1,000,000.00 construction

charge or to force and coerce the plaintiffs and other water-right applicants in said unit and said district to sign a water-rental application or be deprived of a portion of the water owned by them, and in pursuance of said agreement said Mead, Stoutemyer, and Wilbur caused the Assistant Secretary of Interior to issue a public notice and order, a copy of which is hereto attached and made a part hereof, marked "Exhibit F", and also a public notice and order, a copy of which is hereto attached, made a part hereof, and marked "Exhibit G."

XV

That in pursuance of said agreement and said public notices and orders, copies of which are marked "Exhibits F and G", respectively, said Meade, Stoutemyer, and Wilbur notified this plaintiff and other public-notice water-right applicants and water users in the Sun-
35 nyside unit and in said district, that the plaintiffs and all other public-notice water-right applicants in said unit would be deprived of all water in excess of three acre-feet per acre per annum, unless the said plaintiffs and said water-right applicants signed a water-rental application in the words and figures following, to wit:

"WATER-RENTAL APPLICATION

"The undersigned applicant requests excess water under public notice issued by the Secretary February 19, 1932, and agrees to pay applicable charges, with 6% interest from December 1, 1932, until paid. He further agrees that water may be withheld from his land after 1932 until such charges are paid. It is understood that advance payment for excess water will be required in 1933 if the 1932 rental charge remains unpaid at that time.

Witness: ——— ———

——— ———,

"*Water User.*"

The plaintiffs and all other water-right applicants refused to sign said water-rental application. In the event said public notices and orders are enforced, plaintiffs will be deprived of 40% of the water in which they have a vested interest.

XVI

That said Stoutemyer, Mead, and Wilbur agreed with the representatives of other divisions of the Yakima project which were under construction and to be constructed; that said Stoutemyer, Mead, and Wilbur would attempt by means of said water-rental applications to force and coerce the water-right applicants and users, including the plaintiff to authorize the officials of the Sunnyside Valley Irrigation District to execute a contract and pay to the United States the additional sum of $1,000,000.00 construction charges, the same being a portion of cost of constructing the Cle Elum Reservoir and

which was constructed for said new divisions, and/or to collect from the plaintiff and other water-right applicants and water users in said unit by the subterfuge of the water-rental application said sum of $1,000,000 and that in the event said Stoutemyer, Mead, and Wilbur were unable to either force or coerce the execution of such a contract between said district and the United States and/or were unable to collect said sum of $1,000,000.00 by means of depriving the plaintiffs and other water users of a portion of the water owned by them, and/or compelling the plaintiff and said water-right applicants to sign said water-rental applications and collect said sum; and in the event said parties were unable by either of said methods to obtain the payment of the sum of $1,000,000.00, said new divisions for whose benefit said Cle Elum Reservoir was constructed would pay the same.

XVII

That three acre-feet of water per acre is not now, never has been, and will not in the future, be sufficient to beneficially irrigate the land belonging to the plaintiff herein; that a maximum of three acre-feet of water per acre furnished to the land of the plaintiff
36 would enable him to beneficially irrigate about one-half of said land, leaving the other half thereof barren and nonproductive, thereby forcing one-half of the land belonging to the plaintiffs to bear construction, maintenance charges, taxes, and assessments on the whole tract of land; that if plaintiffs attempted to spread a maximum of three acre-feet per acre over the whole tract of land belonging to them, they would not have sufficient water to grow any profitable crop and their land would be completely destroyed for farming purposes, causing them to suffer irreparable loss and damage and which could not be compensated for in an action at law, and plaintiffs have no adequate or complete remedy at law and effective relief can only be administered in a court of equity.

XVIII

That at all times and on all other Federal reclamation projects and ~~on the~~ Sunnyside unit of the Yakima project prior to October 17th, 1930, which were constructed under the Reclamation Act of 1902, the successive Secretaries of Interior, their subordinates, and their representatives charged with the administration of said projects have consistently and uniformly construed the reclamation act, contracts similar to exhibit A, and water-right applications similar to exhibit C to mean that the water-right applicant and water user had purchased, had a vested interest for a water right of a sufficient amount of water to beneficially and successfully irrigate each tract of land in said project and that the determination as to the amount required to beneficially and successfully irrigate each tract was to be made by the representatives and subordinates of the successive Secretaries of the Interior who were charged with the distribution and that the same

was to be made by said representatives and subordinates upon factual investigation obtained by personal examination of the land and crops growing thereon and water requirements thereof; and in all cases the yardstick used in determining the amount of water to which the water applicant either had a vested interest in or owned was beneficial use. That in the administration of the reclamation act under contracts similar to the contract herein referred to no Secretary of the Interior has arbitrarily fixed the amount of water at a certain number of feet, nor taken the question of the determination of the amount of water out of the hands of his representatives and subordinates charged with the physical distribution of the water, nor fixed the maximum amount of water for each acre in the project, regardless of the water requirements, nor required the execution of a water-rental application as a condition precedent to the use and enjoyment by the water user of a sufficient amount of water to beneficially irrigate his land, except as herein alleged in the Sunnyside unit.

XIX

That since the promulgation of said order and notice of October 17th, 1930, and the public notice order of February 19th, 1932, and since the promulgation of order requiring a water-rental application as a condition precedent to the use and enjoyment of more than three acre-feet of water per acre per annum, it has been definitely ascertained by the defendant that the Cle Elum Reservoir, actually
37 cost $1,003,000.00 less than the estimated cost at the time said Mead charged the sum of $1,000,000.00 to the Sunnyside unit as herein alleged; that since that time the Kittitas Reclamation District has entered into contract to purchase from the United States additional water at a total contract price of $2,418,000.00 and the Yakima-Benton Irrigation District, Roza unit, has authorized a contract to be entered into at an additional cost over and above what was taken into consideration at the time of the certificate by the Secretary of the Interior to the President as set forth in plaintiff's exhibit E to the extent of about $800,000.00. That on account of said facts, there is no necessity for enforcing said orders and in the event the same are enforced and the Sunnyside Valley Irrigation District or the plaintiffs and other water users therein pay said sum of $1,000,000.00, the United States will actually receive more than $1,000,000.00 over the entire cost of the construction of said reservoir.

XX

That the public notices, copies of which are hereto attached marked "Exhibit F and G", issued by Ray Lyman Wilbur as Secretary of the Interior on October 17th, 1930, and February 19th, 1932, respectively, requiring the execution by the water user of a water-rental application as a condition precedent to the enjoyment and use by the plaintiff of any water in excess of three acre-feet, were not made

and issued in good faith or by the exercise of an honest judgment for the reasons herein alleged and set forth, but were arbitrarily and capriciously made and the defendant is arbitrarily and capriciously enforcing the same for the express purpose of coercing and forcing this plaintiff and other water-right applicants and water users in said unit and in said district to authorize said district to enter into contract to pay the United States the sum of $1,000,000.00 construction charge, a part of the cost of constructing the Cle Elum Reservoir, and obligating the last faithful acre of land in said district and the plaintiffs' land to pay said sum and/or to force and coerce the plaintiff and other water-right applicants and water users in said unit and district to execute water rental applications so that these plaintiffs and said water-right applicants and water users will be required to pay to the United States said sum of $1,000,000.00.

XXI

That for the reasons herein alleged and set forth said public notice and order of October 17th, 1930, and said public notice and order of February 19th, 1932, copies of which are hereto attached marked "Exhibit F and G", and all orders and notices requiring the execution of a water-rental application as a condition precedent to use and enjoyment of more than three acre-feet per acre per annum are null and void and of no effect whatsoever for the reason that the same are in excess of the power and authority vested in the Secretary of the Interior and the enforcement of said public notice and orders are in excess of the authority vested in the defendant; that if said defendant enforces said public notices and orders the plaintiffs
38 will be deprived of the use of about 40% of the water right, the absolute title to which is vested in plaintiffs pursuant to the terms of the reclamation act, contracts, and laws of the State of Washington, without any hearing, and in positive violation of the Constitution and laws of the United States and also in positive violation of the constitution and laws of the State of Washington.

XXII

That the defendant started the enforcement of said public notice and order of October 17th, 1930, and February 19th, 19[illegible], and the orders requiring a water-rental application to be signed as a condition precedent to the use and enjoyment by the plaintiffs in excess of three acre-feet, during the irrigation season of 1934, and the plaintiffs are advised and believe and therefore allege that said defendant, unless he is restrained by an order of this court, will enforce said orders and public notices during the present irrigation season, that said defendant has refused to give any heed to a joint memorial of the State Legislature of the State of Washington in connection with said public notices and orders and has also refused plaintiff and other water-right applicants and water users a right to be heard and

said defendant has wholly refused to consider plaintiffs' ownership of said water right and takes the position that there is nothing that the plaintiffs can do and that said defendant can arbitrarily and capriciously enforce said public notices and orders and thus compel submission of said water-right applicants and the other water users in said unit and district and collect the sum of $1,000,000.00 to pay a part of the cost of the construction of the Cle Elum Reservoir; that there is no other forum or court that has jurisdiction to give this plaintiff any relief against the unlawful acts of said defendants, and if defendant is permitted to enforce said notices and orders, the plaintiffs' farm will be destroyed for farming purposes and the plaintiffs will be driven therefrom and will lose the savings of an entire lifetime.

Wherefore the plaintiffs pray:

1. That the defendant, Harold L. Ickes, Secretary of the Interior, be required to appear and make answer to the foregoing amended bill of complaint, but not under oath, answer under oath being hereby expressly waived.

2. That upon the filing of this amended bill or at such time thereafter as shall be fixed by the court, an order be issued herein pendente lite requiring the defendant as Secretary of the Interior to suspend the enforcement of the public notice and order, a copy of which is hereto attached, marked "Exhibit F", and to suspend the enforcement of the public notice and order, a copy of which is hereto attached, marked "Exhibit G", promulgated by his predecessor, Ray Lyman Wilbur, and also all notices and orders requiring the execution of a water-rental application as a condition precedent to enjoying the use of more than three acre-feet of water per acre per annum, and restoring to the plaintiffs the rights and privileges that they enjoyed prior to the promulgation of said notices and orders, and that upon the hearing of this action an order be entered requiring the defendant as Secretary of the Interior to vacate, set aside, and hold for naught the said notices and orders herein referred to
39 and that the plaintiffs be restored to the rights and privileges which they enjoyed prior to the promulgation of said notice and orders.

3. For such other and further relief as shall be just and equitable in the premises.

STEPHEN E. CHAFFEE,
Attorney for the plaintiffs.
P. C. KING, JR.,
PRESTON B. KAVANAGH,
Attorneys for plaintiffs.

[*Duly sworn to by Mazina Fox; jurat omitted in printing.*]

NOTE.—

Exhibit A same as exhibit A to original bill.
" C " " " B " " "
" C " " " D " " "
" C " " " C " " "

Exhibit B to amended complaint

PUBLIC NOTICES AND ORDERS

SUNNYSIDE PROJECT, WASHINGTON

DEPARTMENT OF THE INTERIOR,
Washington, March 2, 1909.

In pursuance of the provisions of section 4 of the Reclamation Act of June 17, 1902 (32 Stat. 388), notice is hereby given as follows:

Water will be furnished from the Sunnyside project, Washington, under the provisions of the reclamation act, for the irrigable land shown on the following township plats:

Willamette meridian:
T. 11 N., R. 20 E.
T. 11 N., R. 21 E.
T. 10 N., R. 21 E.
T. 10 N., R. 22 E.
T. 10 N., R. 23 E.
T. 9 N., R. 22 E.
T. 9 N., R. 23 E.
T. 8 N., R. 24 E.
T. 9 N., R. 24 E.

approved March 2, 1909, by the Secretary of the Interior, and on file in the local land office at North Yakima, Washington.

40 Water will be furnished in the irrigation season of 1909 for that portion of the land shown upon a list on file in the local land office, the same having heretofore received water from the said Sunnyside project and now being in cultivation.

Water will be furnished for the remaining portions of the irrigable land shown on said plants, from time to time, as announcement shall be made that water is available.

Water-right applications may be made for the irrigable areas shown on the said plats. The time when payments will be due therefor in hereinafter stated.

The charges which shall be made per acre of irrigable land which can be irrigated by the waters from said irrigation project are in two parts, as follows:

1. The building of the irrigation system $52 per acre of irrigable land, payable in not more than ten annual instalments, each payment not less than $5.20 per acre or some multiple thereof, provided, however, that full payment may be made at any time of any balance remaining due after certification has been made by the Commissioner of the General Land Office that full and satisfactory complaint has been shown with all the requirements of the law as to residence, cultivation, and reclamation.

2. For operation and maintenance, which will, as soon as the data are available, be fixed in proportion to the amount of water used, with a minimum charge per acre of irrigable land whether water is used thereon or not. The operation and maintenance charge for the irri-

gation season of 1909, and until further notice, will be 95 cents per acre of irrigable land, for which water is ready in the irrigation season of 1909, whether water is used thereon or not.

The first instalment on account of said charges for the irrigable lands shown on the list on file in the local land office to receive water in the irrigation season of 1909 shall be due March 15, 1909. The second installment shall be due March 1, 1910. Subsequent instalments shall be due on March 1 of each year thereafter until fully paid. All charges are payable at the local land office, North Yakima, Washington.

The first instalment of the charges for the irrigable land, for which water is to be subsequently furnished, will be due on March 1 of the year in which water shall be available for said lands, and subsequent instalments shall be due on March 1 of each year thereafter until fully paid.

The first instalment of charges for all lands shown on the said list, for which it is hereby announced that water will be available in the season of 1909, whether or not water-right application is made therefor or water is used thereon, shall be due and payable as herein provided.

The regulation is hereby established that no water will be furnished in any year until all operation and maintenance charges levied for that year shall have been paid in full. Accordingly, no water will be furnished during the irrigation season of 1909 for any lands until the portion of the instalment for operation and maintenance due on March 15, 1909, has been paid, and no water will be furnished in any subsequent irrigation season until the payment has been made of the portion of the instalment for operation and maintenance due March 1 of said year.

41 Failure to make any two payments of the instalments of charges when due shall render the application subject to cancellation, with forfeiture of all rights under the application, as well as of any moneys already paid thereon.

The charges herein provided for may, for the convenience of the applicants, be paid to the special fiscal agent of the U. S. Reclamation Service assigned to the Sunnyside project for transmission to the register and receiver of the local land office, provided the necessary charges for transportation of the cash, as determined by the special fiscal agent, accompany the payment of the water-right charges.

JAMES RUDOLPH GARFIELD,
Secretary of the Interior.

Exhibit D to amended complaint

GENERAL PUBLIC NOTICE FOR ALL RECLAMATION PROJECTS

DEPARTMENT OF THE INTERIOR,
Washington, September 24, 1914.

1. In pursuance of the provisions of the Reclamation Extension Act of August 13, 1914 (Public, No. 170), notice is hereby given that

the charges for a water right for lands under the several projects and units thereof for which public notice or notices have heretofore issued are of two kinds: (1) A charge per irrigable acre for the building of the irrigation system, termed as "construction charge"; (2) an annual charge for each acre-foot of water delivered, payable at such time as may hereafter be fixed, for the operation and maintenance of the project or a unit thereof. Each acre of irrigable land, whether irrigated or not, will be charged with a minimum operation and maintenance charge based upon the charges for delivery of not less than one acre-foot of water.

2. The amount of the construction charge per irrigable acre for lands for which entry under the provisions of the Reclamation Act of June 17, 1902 (32 Stat. 388), or water-right application has heretofore been made shall be the amount fixed in the several public notices heretofore issued for the respective lands and therein termed "the building charge", and will not be increased, except as provided in said Reclamation Extension Act.

3. Any person whose land or entry has heretofore become subject to the terms and conditions of the reclamation law may secure the benefits of the extension of the period of payments, provided for in the said Reclamation Extension Act, by notifying the Secretary of the Interior of his acceptance of all the terms and conditions of said act. Such notice of acceptance shall be in the form prescribed by the Secretary, and may be obtained from the project manager on application. Such acceptance must be filed with the project manager within six (6) months from the date of this public notice. The construction charge for the lands or entries of persons so accepting the benefits of the period of extension, or so much thereof as may remain unpaid at the time of the filing said notice of acceptance, must be paid in not more than twenty (20) annual instalments, the first of which instalments will be due December 1, 1914, and the subsequent instal-
ments due December 1 of each year thereafter. The first four
42 of such annual instalments shall be each two (2) per centum,
and the next two instalments each four (4) per centum, and the remaining fourteen instalments each six (6) per centum of the said construction charge or of the portion thereof remaining unpaid at the time of filing said notice of acceptance, as the case may be. The whole or any part of the construction charge may be paid within any shorter period than 20 years, if so desired.

4. The method of determining the annual operation and maintenance charge, the penalties for failure to pay the construction charges, and the operation and maintenance charges, when due, the reclamation requirements, and the discount allowed for prepayment of the operation and maintenance charges are prescribed by the said Reclamation Extension Act.

FRANKLIN K. LANE,
Secretary of the Interior.

Exhibit E to amended complaint

DECEMBER 11, 1930.

MY DEAR MR. PRESIDENT: The acts of Congress of March 7, 1928, 45 Stat. 200, 228, and of March 4, 1929, 45 Stat. 1562, 1592, make appropriations of $500,000 and $1,000,000, respectively, for the construction of Cle Elum Dam, Yakima project. By act of May 14, 1930, 46 Stat. 279, 308, the unexpended balances of these appropriations were made available during the fiscal year 1931.

Section 4 of the act of June 25, 1910, provides in effect that after the date of that act no irrigation project to be constructed under the act of June 17, 1902, 32 Stat. 388, and amendatory acts shall be undertaken until the project shall have been recommended by the Secretary of the Interior and approved by the direct order of the President.

Subsection B, section 4 of the act of December 5, 1934 (43 Stat. 702), provides as follows:

"That no new project or new division of a project shall be approved for construction or estimates submitted therefor by the Secretary until information in detail shall be secured by him concerning the water supply, the engineering features, the cost of construction, land prices, and the probable cost of development, and he shall have made a finding in writing that it is feasible, that it is adaptable for actual settlement and farm homes, and that it will probably return the cost thereof to the United States."

As the sixth and last of a series of dams for regulating and storing the waters of the Yakima River and tributaries, it is proposed to construct an earth- and gravel-fill storage dam located on the Cle Elum River, a tributary of the Yakima River. This dam is to have a maximum height of about 125 feet, a crest length of 700 feet, and a volume of about 450,000 cubic yards of material, forming a reservoir with an area of 4,680 acres for storage of 435,000 acre-feet of water for the irrigation of lands under the Yakima project. The cost of the storage dam is estimated at $2,800,000, of the reservoir right-of-way $300,000, and of flowage rights and contingencies, $400,000, making the total estimated cost $3,500,000. This constitutes a part of the storage system of the project, the total actual and estimaed cost of which
43 is $11,558,000. Of his amount, the return of $6,996,000 is guaranteed under existing contracts, leaving a balance of $4,562,000, the repayment of which will be provided for as follows: Five hundred eighty thousand dollars is to be repaid by the Wapato Indian Reservation, $1,000,000 by rentals from the Sunnyside division of the Yakima project, and the remainder by the Roza and Kennewick divisions of the project.

The development is believed to be feasible, the project is adaptable for actual settlement and farm homes, and the cost of construction of the dam will in all probability be returned to the United States.

It is recommended that this work be approved, and that the necessary authority be issued to this Department to make contracts for the construction of the dam and to proceed with the work.

Very truly yours,

(Signed) RAY LYMAN WILBUR.

Exhibit F to amended complaint

OCTOBER 17, 1930.

NOTICE AND RULES AND REGULATIONS

As to water deliveries in the Sunnyside Valley Irrigation District for the year 1931 and subsequent years and determination of amount of water required

The water applications and water-right contracts which determine the limit of the individual water rights in the Sunnyside Valley Irrigation District provide in most cases—

(A) for the delivery of three (3) acre-feet of water or so much thereof as is necessary for beneficial use in years of ordinary run-off in Yakima River, with a provision for a prorata reduction in years of unusual drought or low water.

(B) Some of such applications or contracts provide for delivery of 3-acre-feet subject to a proviso, "that the amount of water furnished shall be limited to the amount beneficially used upon said lands."

(C) Still other applications or contracts provide for delivery of 3 acre-feet per annum per acre, "or as much more water as will be required to successfully irrigate the land, the amount so required to be determined by the authorized agent of the United States" and subject to the proviso "That the amount of water furnished shall be limited to the amount beneficially used upon such lands" and the further provision "that the United States shall not be responsible for the failure to supply water under this contract caused by insufficient supply or water in Yakima River due to hostile diversion or unusual drought."

The amount of water required to grow a successful crop depends largely upon the amount of labor and money expended in preparing the land, providing equipment for economical use of water, and caring for the water to avoid waste. Cheap storage sites are available on the Yakima River, particularly at Lake Cle Elum, and it
44 may be cheaper to provide additional storage than to provide the necessary labor and equipment to secure an economical use of water. If the purchase of additional storage is preferred to strict economy in the use of the existing water supply the opportunity is available to provide additional storage by participation in the construction of another reservoir.

Owing to the fact that the canal system of the Kittitas division of the Yakima project has not heretofore been completed and the lands of that division have not heretofore been ready to use the stored water to which they are entitled, it has been possible to allow the water users of the Sunnyside Valley Irrigation District the temporary use of water in excess of the amounts specified in their respective contracts and water applications, but the Kittitas division is now beginning the use of the water to which it is entitled under the contract between the Kittitas Reclamation District and the United States and it has now become necessary to limit water deliveries in the Sunnyside Valley Irrigation District to the amounts specified in the contracts and water applications applicable to the lands of that district.

In order that all water users in the Sunnyside Valley Irrigation District may know in advance that economy in the use of water will hereafter be necessary, and be prepared to take care of the water and use it to the best advantage, notice is hereby given that as to all lands except those above referred to in paragraph (C), during the year 1931 and subsequent years, until further notice, water deliveries in that district will be limited to three (3) acre-feet per irrigable acre per year as specified in the said contracts, and applications, except in years of unusual drought or low water when it will be necessary to limit deliveries to a somewhat smaller amount as provided for in said contracts applicable to the lands of the district; provided, however, that so long as there is surplus stored water available not required to meet the contract obligations of the United States to other parties, water in excess of three acre-feet may be rented by water users of the Sunnyside Valley Irrigation District of the classes referred to above as A and B whose rights are limited under their applications and contracts to 3 acre-feet. The water-rental charge for such extra water in excess of 3 acre-feet, used during the irrigation season of 1931, will be one dollar and fifty cents ($1.50) per acre-foot, and the rental rate will be announced annually for subsequent seasons. All money collected for the rental of such extra water will be applied toward the payment of the unsecured portion of the construction costs of the reservoir system of the Yakima project.

The determination "by the authorized agent of the United States" of the amount of water required "to successfully irrigate" the lands subject to the above-quoted clause referred to in paragraph C will be made during the year 1931 and deliveries to such lands in 1932 and subsequent years will be governed by such determination except in years of unusual drought or low water when it will be necessary to limit deliveries to a somewhat smaller amount as provided for in said contracts applicable to such lands.

(Signed) JOHN H. EDWARDS,
Assistant Secretary of the Interior.

45 *Exhibit G to amended complaint*

60865

UNITED STATES DEPARTMENT OF THE INTERIOR (No. 31)

BUREAU OF RECLAMATION

SUNNYSIDE DIVISION—YAKIMA PROJECT

PUBLIC NOTICE OF ANNUAL OPERATION AND MAINTENANCE CHARGES

(Act of June 17, 1902, 32 Stat. 388, as amended or supplemented)

WASHINGTON, D. C., *February 19, 1932.*

1. *Operation and maintenance charges for project lands.*—For the purpose of equitably determining operation and maintenance charges for the lands of the Sunnyside division, Yakima project, Washington, notice is hereby given that for the irrigation season of 1932, and thereafter until further notice, each acre of irrigable land subject to public notice rates in said division, whether water is used or not, shall be charged with a minimum operation and maintenance charge of one dollar and fifty cents ($1.50), which will permit delivery of not more than the amounts per irrigable acre to which such lands are entitled under notice and regulations of the Secretary dated October 17, 1930, and in accordance with the following schedule per irrigable acre:

Monthly schedule of deliveries:	
April	13.3 per cent
May	15.0 " "
June	18.3 " "
July	18.3 " "
August	16.7 " "
September	11.7 " "
October	6.7 " "

The above deliveries will be contingent on beneficial use, as determined by the project superintendent.

2. *Charges for water rental for lands subject to public notice.*—The lands of the Sunnyside division, Yakima project, Washington, under public notice, have been divided by the Sunnyside Valley Irrigation District into three classes, according to water requirements, namely, (a), (b), and (c), and a map showing such classification is on file in the office of the project superintendent and in the office of the irrigation district. For additional water (if available from either storage or natural flow) delivered during the months of June, July, and August in excess of the monthly schedule of the preceding paragraph the rental charge, as provided in notice of October 17, 1930, will be as follows:

Class A—$1.50 per acre-foot.
Class B— .75 per acre-foot.
Class C— .50 per acre-foot.

When available, water in excess of this schedule will be delivered during the other months of the season without extra charge.

46 3. *Charges for rental water for lands under supplemental water-right contracts.*—For lands receiving water under said division of said project, by virtue of certain supplemental water-right contracts with the United States, under the provisions of which a minimum operation and maintenance charge is fixed which permits the delivery of amounts of water determined in accordance with the public notice of October 17, 1930, a rental charge of one and 50/100 dollars ($1.50) per acre-foot for additional water (if available from storage or natural flow) delivered during each of the months of June, July, and August in excess of the said determined amounts will be made. When available, water in excess of the determined amounts will be delivered during the other months of the season without extra charge.

4. *Water-rental charges for lands outside the project.*—For water which may be furnished lands outside the limits of the said division of said project the charge shall be one dollar ($1.00) per acre-foot for the irrigation season of 1932 and thereafter until further notice.

5. Water rights secured with lands the title to which has passed to the several irrigation districts and the farming of which is now abandoned may be used upon types or classes of land specified by the irrigation districts, under approved rules and regulations, where the same is not now covered by district contract, such designation to be made within thirty (30) days after date of this public notice.

6. *Time of payment.*—All water charges announced herein are due and payable on December 31 following the irrigation season.

Jos. M. Dixon,
First Assistant Secretary.

In Supreme Court of District of Columbia

Motion to dismiss

Filed June 7, 1935

* * * * * * *

Comes now Harold L. Ickes, Secretary of the Interior, the defendant in the above-entitled cause, and moves to dismiss the above-entitled cause and the plaintiffs' amended bill of complaint in said cause upon each and every of the following grounds:

1. That the defendant has no individual interest in the controversy, and the relief sought against him in his official capacity only, as a representative of the Government, which alone is to be affected by any decree herein, wherefore this suit, as manifest upon the face of the amended bill of complaint, is essentially and substantially a suit against the United States, beyond the jurisdiction of the court.

2. That the amended bill of complaint and the exhibits attached thereto and made a part thereof show that this suit is brought on contracts to which the United States is a party, and that the decree

prayed for would affect the interest of the United States in said contracts and the property of the United States, whereof the court is without jurisdiction.

3. That it is manifest, upon the face of the amended bill of complaint, that the plaintiffs seek, in substance and effect, a decree for specific performance by the United States of alleged obligations under its contracts, whereof the court is without jurisdiction.

47 4. That it appears by the amended bill of complaint that the plaintiffs have a plain, adequate, and complete remedy at law, if they have any right.

5. That it is manifest upon the face of the amended bill of complaint that the relief prayed for therein would necessarily involve continued and detailed supervision by this court for a long and indefinite period of the performance of contract duties that require the exercise of personal judgment and technical skill, wherefore said bill lacks equity.

Wherefore the defendant, Harold L. Ickes, Secretary of the Interior, prays that the above-entitled cause be dismissed, that the amended bill of complaint in said cause be dismissed, and that he be permitted to go hence without day, be for nothing held, and recover of the plaintiffs his costs.

NATHAN R. MARGOLD,
Solicitor, Department of the Interior,
J. KENNARD CHEADLE,
Assistant Solicitor, Department of the Interior,
HOWARD R. STINSON,
Assistant Solicitor, Department of the Interior,
Attorneys for Defendant.

Service accepted & copy received June 7th, 1935.

STEPHEN E. CHAFFEE,
One of Attys. for Plffs.

In Supreme Court of District of Columbia

Memorandum opinion

Filed June 14, 1935

* * * * * * *

In sustaining the motions in these cases for leave to file the amended bills accompanying the motions I necessarily considered the questions raised by the motions to dismiss.

My opinion has not been changed by the argument and briefs in behalf of the motions, and the motions to dismiss will be overruled, with leave to the defendant to answer within thirty days.

BAILEY, *J.*

In Supreme Court of District of Columbia.

Order denying motion to dismiss amended bill of complaint

Filed June 24, 1935

* * * * * * *

The above-entitled cause coming on to be further heard on defendant's motion to dismiss the amended bill of complaint herein, and the parties thereto having appeared in open court by their respective attorneys and the arguments of said attorneys on said motion having been heard, the matter having been submitted, and the Court being fully advised in the premises, and having denied said motion to dismiss; it is hereby

48 Ordered, adjudged, and decreed this 24th day of June 1935 that the defendant's motion to dismiss plaintiffs' amended bill of complaint be, and the same is hereby, denied, with leave to the defendant to answer within thirty days.

JENNINGS BAILEY, *Justice.*

From the foregoing order the defendant, by his attorney of record in open court, notes a petition to the United States Court of Appeals for the District of Columbia for the allowance of a special appeal; whereupon it is hereby further ordered that further proceedings in this cause be stayed pending disposition of the aforesaid petition for a special appeal, and if said petition be granted, then pending disposition of the special appeal. If said petition or said special appeal be finally decided adversely to the defendant herein, the defendant shall have leave to answer within thirty days from such final decision.

JENNINGS BAILEY, *Justice.*

Acceptable as to form. No objection:

PRESTON B. KAVANAGH,
One of Attorneys for Plaintiffs.

In United States Court of Appeals for the District of Columbia
[Title omitted.]

Order allowing special appeal

Filed July 23, 1935

On consideration of the petition for the allowance of a special appeal in the above-entitled cause from the order of the Supreme Court of the District of Columbia entered therein on June 24, 1935, by Mr. Justice Jennings Bailey,

prayed for would affect the interest of the United States in said contracts and the property of the United States, whereof the court is without jurisdiction.

3. That it is manifest, upon the face of the amended bill of complaint, that the plaintiffs seek, in substance and effect, a decree for specific performance by the United States of alleged obligations under its contracts, whereof the court is without jurisdiction.

47 4. That it appears by the amended bill of complaint that the plaintiffs have a plain, adequate, and complete remedy at law, if they have any right.

5. That it is manifest upon the face of the amended bill of complaint that the relief prayed for therein would necessarily involve continued and detailed supervision by this court for a long and indefinite period of the performance of contract duties that require the exercise of personal judgment and technical skill, wherefore said bill lacks equity.

Wherefore the defendant, Harold L. Ickes, Secretary of the Interior, prays that the above-entitled cause be dismissed, that the amended bill of complaint in said cause be dismissed, and that he be permitted to go hence without day, be for nothing held, and recover of the plaintiffs his costs.

NATHAN R. MARGOLD,
Solicitor, Department of the Interior,
J. KENNARD CHEADLE,
Assistant Solicitor, Department of the Interior,
HOWARD R. STINSON,
Assistant Solicitor, Department of the Interior,
Attorneys for Defendant.

Service accepted & copy received June 7th, 1935.

STEPHEN E. CHAFFEE,
One of Attys. for Plffs.

In Supreme Court of District of Columbia

Memorandum opinion

Filed June 14, 1935

* * * * * * *

In sustaining the motions in these cases for leave to file the amended bills accompanying the motions I necessarily considered the questions raised by the motions to dismiss.

My opinion has not been changed by the argument and briefs in behalf of the motions, and the motions to dismiss will be overruled, with leave to the defendant to answer within thirty days.

BAILEY, *J.*

In Supreme Court of District of Columbia

Order denying motion to dismiss amended bill of complaint

Filed June 24, 1935

* * * * * * *

The above-entitled cause coming on to be further heard on defendant's motion to dismiss the amended bill of complaint herein, and the parties thereto having appeared in open court by their respective attorneys and the arguments of said attorneys on said motion having been heard, the matter having been submitted, and the Court being fully advised in the premises, and having denied said motion to dismiss; it is hereby

48 Ordered, adjudged, and decreed this 24th day of June 1935 that the defendant's motion to dismiss plaintiffs' amended bill of complaint be, and the same is hereby, denied, with leave to the defendant to answer within thirty days.

JENNINGS BAILEY, *Justice.*

From the foregoing order the defendant, by his attorney of record in open court, notes a petition to the United States Court of Appeals for the District of Columbia for the allowance of a special appeal; whereupon it is hereby further ordered that further proceedings in this cause be stayed pending disposition of the aforesaid petition for a special appeal, and if said petition be granted, then pending disposition of the special appeal. If said petition or said special appeal be finally decided adversely to the defendant herein, the defendant shall have leave to answer within thirty days from such final decision.

JENNINGS BAILEY, *Justice.*

Acceptable as to form. No objection:

PRESTON B. KAVANAGH,
One of Attorneys for Plaintiffs.

In United States Court of Appeals for the District of Columbia
[Title omitted.]

Order allowing special appeal

Filed July 23, 1935

On consideration of the petition for the allowance of a special appeal in the above-entitled cause from the order of the Supreme Court of the District of Columbia entered therein on June 24, 1935, by Mr. Justice Jennings Bailey,

It is ordered by the court that the petition be, and it is hereby, granted and a special appeal allowed as prayed.

Per Mr. CHIEF JUSTICE MARTIN.

JULY 22, 1935.
A true copy.
Test:

HENRY W. HODGES,
Clerk.

By MONCURE BURKE,
Deputy Clerk.

49 In Supreme Court of District of Columbia

Assignment of errors

Filed July 26, 1935

* * * * * * *

Now comes the defendant, Harold L. Ickes, Secretary of the Interior, by his attorneys, and assigns as errors of the Supreme Court of the District of Columbia in the above-entitled cause the following:

1. The court erred in denying defendant's motion to dismiss the amended bill of complaint.

2. The court erred in signing and entering the order denying the motion to dismiss the amended bill of complaint.

3. The court erred in holding that the suit of plaintiffs was not brought against the United States.

4. The court erred in not granting the motion to dismiss the amended bill of complaint and in not dismissing the amended bill of complaint for lack of jurisdiction.

5. The court erred in not holding that the defendant has no individual interest in the controversy and that the relief sought against him is in his official capacity only, as an officer of the United States, which alone is to be effected by any decree herein, wherefore the suit, as manifest upon the face of the amended bill of complaint, is essentially and substantially a suit against the United States, beyond the jurisdiction of the court.

6. The court erred in not holding that the amended bill of complaint and the exhibits attached thereto and made a part thereof show that the suit is brought on contracts to which the United States is a party and that the decree prayed for would affect the interests of the United States in said contracts and the property of the United States, wherefore the court is without jurisdiction.

7. The court erred in not holding that the amended bill of complaint prays, in substance and effect, for a decree for specific performance by the United States of alleged obligations under its contracts, whereof the court is without jurisdiction.

8. The court erred in not holding that it appears by the amended bill of complaint that the plaintiffs have a plain, adequate, and complete remedy at law, if they have any right.

9. The court erred in not holding that the relief prayed for in the amended bill of complaint would necessarily involve continued and detailed supervision by this court, for a long and indefinite period, of the performance of contract duties that require the exercise of personal judgment and technical skill, wherefore said bill lacks equity.

NATHAN R. MARGOLD,
Solicitor, Department of the Interior,
FREDERICK BERNAYS WIENER,
Assistant Solicitor, Department of the Interior,
JACKSON E. PRICE,
Assistant Solicitor, Department of the Interior,
Attorneys for the defendant.

Service of a copy of the above assignment of errors acknowledged this 26th day of July 1935.

PRESTON B. KAVANAGH,
One of the Attorneys for the Plaintiff.

50 *Memorandum*

August 13, 1935

Time to file transcript of record in Court of Appeals extended to September 16, 1935.

In Supreme Court of District of Columbia

Designation of record

Filed July 26, 1935

* * * * * * *

The court will please prepare a transcript of the record in the above-entitled cause and include therein the following:

1. Bill of complaint.
2. Order of the court permitting amendment to the bill of complaint.
3. Amendment to bill of complaint.
4. Motion to dismiss bill of complaint, as amended.
5. Memorandum opinion of Mr. Justice Bailey granting motion to dismiss bill of complaint, as amended.
6. Order of the court granting motion to dismiss and dismissing bill of complaint, as amended.
7. Motion for leave to amend.
8. Memorandum opinion of Mr. Justice Bailey granting motion for leave to amend.
9. Order granting motion for leave to amend and permitting plaintiffs to file proposed amended bill of complaint.
10. Amended bill of complaint.
11. Motion to dismiss amended bill of complaint.

12. Memorandum opinion of Mr. Justice Bailey overruling motion to dismiss amended bill of complaint.
13. Order denying motion to dismiss amended bill of complaint.
14. Order showing allowance of special appeal by Court of Appeals.
15. Assignment of errors.
16. This designation.

NATHAN R. MARGOLD,
Solicitor, Department of the Interior,
FREDERICK BERNAYS WIENER,
Assistant Solicitor, Department of the Interior,
JACKSON E. PRICE,
Assistant Solicitor, Department of the Interior,
Attorneys for the Defendant.

Service of a copy of the above designation of record acknowledged this 26th day of July 1935.

PRESTON B. KAVANAGH,
One of the Attorneys for the Plaintiffs.

51 [Clerk's Certificate to foregoing transcript omitted in printing.]

52 In United States Court of Appeals

[Title omitted.]

Minute entry

January 7, 1936

The argument in the above entitled causes was commenced by Mr. F. B. Wiener, attorney for appellant, and was continued by Mr. Stephen E. Chaffee, attorney for appellees, and was concluded by Mr. F. B. Wiener, attorney for appellant.

53 In United States Court of Appeals for the District of Columbia

No. 6541

HAROLD L. ICKES, SECRETARY OF THE INTERIOR, APPELLANT
v.
MAZINE Z. FOX AND JOSIE R. FOX, HIS WIFE, APPELLEES

No. 6542

HAROLD L. ICKES, SECRETARY OF THE INTERIOR, APPELLANT
v.
PHILIP LOUIS PARKS AND OLLIE D. PARKS, HIS WIFE, APPELLEES

No. 6543

HAROLD L. ICKES, SECRETARY OF THE INTERIOR, APPELLANT
v.
JACOB F. OTTMULLER, APPELLEE

Appeal from the Supreme Court of the District of Columbia

Decided—June 8, 1936

Nathan R. Margold, *Frederick Bernays Wiener*, *Jackson E. Price*, of Washington, D. C., for Appellants.

Preston B. Kavanagh, *P. C. King, Jr.*, of Washington, D. C., and *Stephen E. Chaffee*, of Sunnyside, Washington, for Appellees.

Before MARTIN, Chief Justice; ROBB, VAN ORSDEL, GRONER, and STEPHENS, Associate Justices

Opinion

VAN ORSDEL, Associate Justice. These are three special appeals by the Secretary of the Interior, Harold L. Ickes, from orders of the Supreme Court of the District of Columbia denying his motions to dismiss amended bills in equity brought by appellees, plaintiffs below, to restrain the defendant Ickes, as Secretary of the Interior, from the enforcement of certain public notices issued by his predecessor in office, Ray Lyman Wilbur, limiting plaintiffs' water right appropriations in the Sunnyside Unit of Yakima Project, a Federal Reclamation Project in the State of Washington, to an amount of water much less than the rights and privileges which plaintiffs enjoyed prior to the promulgation of the notices and orders in question.

Pursuant to the terms of the Reclamation Act of June 17, 1902, 32 Stats. 328, as amended U. S. C., T. 43, Chap. 12, the United
54 States undertook the construction and operation of the Yakima Project. Acting under the law, the United States purchased from the Washington Irrigation Company the Sunnyside Canal, water appropriations and irrigation system used in connection therewith. In addition to the rights thus procured, the United States secured appropriations from the Yakima river system, pursuant however to the express provisions therefor in the laws of the State of Washington, and provided storage for the waters thus appropriated from the state in reservoirs constructed, owned, and operated by the United States. Plaintiffs were appropriators and owners of water rights in the Sunnyside Canal from the Washington Irrigation Company long prior to its purchase by the United States. Plaintiffs were required by the government, as a condition of procuring water for irrigation of their lands, to execute and deliver to the United States certain water-right obligations. In consideration of procuring these rights, plaintiffs were required to pay to the gov-

ernment of the United States "the sum of $10.00 per acre for the benefits to be derived from said project of the United States", which amount it is alleged has been fully paid and any claims therefor from the government, or liens thereunder, have been fully satisfied and discharged.

It is important at this point to ascertain the nature of the water-rights purchased from the United States by plaintiffs or their predecessors as stated in the several applications. In the Fox case: "The measure of the water right for said land is that quantity of water which shall be beneficially used for the irrigation thereof, but in no case exceeding the share proportionate to irrigable acreage, of the water supply actually available as determined by the project manager or other proper officer of the United States, or of its successors in control of the project, during the irrigation season for the irrigation of lands under said unit." In the Parks case the measure of the water right purchased is fixed in the application as follows: "The amount of water to be furnished hereunder shall be three (3) acre-feet of water per annum per acre measured at the land, or as much more water as will be required to successfully irrigate the land, the amount so required to be determined by the authorized agent of the United States, and the water shall be used only to irrigate said lands and for domestic purposes incident thereto; provided, that the amount of water furnished shall be limited to the amount beneficially used upon such lands." In the Ottmuller case the water right application provided: "The quantity of water to be furnished thereto shall be three (3) acre-feet of water per annum per acre of irrigable land as aforesaid, measured at the land; or so much thereof as did constitute the proportionate share per acre from the water supply actually available for the lands under said project; provided, that the supply furnished shall be limited to the amount of water beneficially used on said irrigable land."

Plaintiffs, in their amended bills of complaint, base their rights to the use of water primarily on the rights acquired by them or their predecessors by purchase from the Washington Irrigation Company,
55 under which it is alleged there was furnished by the company and beneficially used upon the lands in question: In the case of Parks, 6 acre-feet of water per acre per annum; in the case of Ottmuller, 5.56 acre-feet of water per acre per annum; and in the case of Fox, 4.84 acre-feet of water per acre per annum; which rights under the laws of the State of Washington became appurtenant to the lands and is real estate. (Rem. R. S. Wash. Sec. 7391.)

It is alleged by the plaintiffs in their respective bills that the United States completed the construction of the irrigation unit, constructed reservoirs of sufficient capacity to beneficially and successfully irrigate all lands within said unit, and a determination had been made that the respective amounts originally acquired by the plaintiffs of water per acre per annum was necessary to beneficially and successfully irrigate the lands, and after the delivery of the water for several years

and its beneficial use Congress passed an Act (38 Stat. 687; 43 U. S. C. A., Sec. 469) providing: "No increase in the construction charges shall after August 13, 1914, be made, after the same have been fixed by public notice, except by agreement between the Secretary of the Interior and a majority of the water-right applicants and entrymen to be affected by such increase." This restriction was confirmed on September 24, 1914, by Franklin K. Lane, then Secretary, in a public notice, as follows: "The amount of the construction charge per irrigable acre for lands for which entry under the provisions of the Reclamation Act of June 17, 1902 (32 Stat. 388), or water-right application has heretofore been made, shall be the amount fixed in the several public notices heretofore issued for the respective lands and therein termed 'the building charge' and will not be increased, except as provided in said Reclamation Extension Act."

The statute law of the State of Washington provides: "The right to the use of water which has been applied to a beneficial use in the State shall be and remain appurtenant to the land or place upon which the same is used." (Remington's R. S., Sec. 7391). In view of this statute the successive Secretaries of the Interior construed the contracts as conveying to each purchaser a sufficient amount of water to beneficially and successfully irrigate his land. Indeed, this was imperative under Sec. 8 of the Reclamation Act (43 U. S. C. A., Sec. 372), which provides: "The right to the use of water acquired under the reclamation law shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right."

It is alleged that "it was determined by the successive Secretaries of the Interior, their representatives, and their subordinates" that in the case of Parks, 6 feet of water per acre per annum; in the case of Ottmuller, 5.56 feet; and in the case of Fox, 4.84 acre feet "was necessary to beneficially and successfully irrigate said land; that pursuant to said practical construction and determination the successive Secretaries of the Interior, their representatives, and subordinates have for a period of more than 20 years delivered to said land the amount of water necessary to beneficially and successfully irrigate the same, which water has at all times been beneficially used thereon for irrigation purposes."

It is alleged that in the year 1930 Elwood Mead, Commissioner of Reclamation of the United States, recommended the construc-
56 tion of the Cle Elum Reservoirs at a cost of $3,500,000 for the purpose of storing water for the irrigation of lands in Kittitas Reclamation District, and also for the purpose of supplying water for the irrigation of lands in the Roza and Kennewick divisions of the Yakima Project. Mead, it is alleged, ascertained that the cost of the reservoir would be $1,000,000 more than the amount that would be returned to the reclamation fund from these divisions. It was necessary, therefore, before the commencement of reservoir construction, that a source should be ascertained from which the $1,000,000 could be obtained. It is alleged that Mead accordingly "without consulting these plaintiffs or other water users in said unit in said District,

charged the sum of $1,000,000 to said unit in said District and furnished the Secretary of the Interior information that provision had been made for the payment by said unit of said sum."

It is also alleged that thereafter Mead and one Stoutemyer, District Counsel, and Secretary Wilbur, in order to compel the plaintiffs and other water users to contract to pay the sum of $1,000,000, caused the Assistant Secretary of the Interior on October 17, 1930, to issue an order which, among other things, provided: "The water applications and water-right contracts which determine the limit of the individual water rights in the Sunnyside Valley Irrigation District provided in most cases—

(A) For the delivery of three (3) acre-feet of water or so much thereof as is necessary for beneficial use in years of ordinary run-off in the Yakima River, with a provision for pro rata reduction in years of unusual drought or low water.

(B) Some of such applications or contracts provide for delivery of 3 acre-feet, subject to a proviso 'that the amount of water furnished shall be limited to the amount beneficially used upon said lands.'

(C) Still other applications or contracts provide for the delivery of 3 acre-feet per annum per acre, 'or as much more water as will be required to successfully irrigate the land, the amount so required to be determined by the authorized agent of the United States', and subject to the proviso 'that the amount of water furnished shall be limited to the amount beneficially used upon such lands', and the further provision 'that the United States shall not be responsible for the failure to supply water under this contract caused by insufficient supply of water in the Yakima River, due to hostile diversion or unusual drought.'"

After a statement by the Assistant Secretary on the economical use of water for irrigation to avoid waste, and the additional storage capacities that would be supplied, and the statement that heretofore due to the fact that the Kittitas division of the Yakima project had not been completed it had been possible to permit water users in the Sunnyside Valley irrigation District to use water in excess of amounts specified in their contracts and applications, it was ordered: "In order that all water users in the Sunnyside Valley Irrigation District may know in advance that economy in the use of water will hereafter be necessary, and be prepared to take care of the water and use it to the best advantage, notice is hereby given that as to all lands except those above referred to in paragraph (C), during the year 1931 and
57 subsequent years, until further notice, water deliveries in that district will be limited to three (3) acre-feet per irrigable acre per year, as specified in the said contracts and applications, except in years of unusual drought or low water, when it will be necessary to limit deliveries to a somewhat smaller amount, as provided for in said contracts applicable to the lands of the District; provided, however, that so long as there is surplus stored water available not required to meet contract obligations to the United States to other parties, water in excess of three acre-feet may be rented by water users of the

Sunnyside Valley Irrigation District of the classes referred to above as 'A' and 'B' whose rights are limited under their applications and contracts to 3 acre-feet. The water-rental charge for such extra water in excess of 3 acre-feet, used during the irrigation season of 1931, will be one dollar and fifty cents ($1.50) per acre-foot, and the rental rate will be announced annually for subsequent seasons. All money collected for the rental of such extra water will be applied toward the payment of the unsecured portion of the construction costs of the reservoir system of the Yakima project."

A further notice and order was given by the First Assistant Secretary of the Interior on May 5, 1932, in which a classification of the lands was made as those entitled to three acre-feet per acre, 3,5 acre-feet per acre, and four acre-feet per acre. This classification was made by one W. W. Johnson in a report of February 1932. It was then ordered that water users under these various classifications "except in years of unusual drought or low water, when water deliveries to said lands may be limited to less than the quantities herein designated, the amount indicated for that class will constitute the required water deliveries to said land"; and that water deliveries beginning with the irrigation season of 1932 "in excess of the above determined quantity per acre, will be suggested to water-rental charges at rates established in public notice for the irrigation season of 1932 and in subsequent public notices."

These orders amounted to notice to Fox and Ottmuller that they would be deprived of all water rights in excess of three acre-feet of water per annum, and that Parks would likewise be deprived of all water rights in excess of 3½ acre-feet per annum, unless plaintiffs would sign a new water rental application which they, together with all other water-rights applicants refused to sign. This application provided as follows: "The undersigned applicant requests excess water under public notice issued by the Secretary February 19, 1932, and agrees to pay applicable charges, with 6% interest from December 1, 1932, until paid. He further agrees that water may be withheld from his land after 1932 until such charges are paid. It is understood that advance payment for excess water will be required in 1933, if the 1932 rental charge remains unpaid at that time."

We are confronted again by the usual contention that this is a suit against the United States, and as such cannot be maintained. This is urged on the theory that the action is one to require the specific performance of a contract with the United States. This is not an action for specific performance. It is an action to restrain the Secretary of the Interior from enforcing the alleged illegal orders issued by
58 that officer and his predecessor in office in his capacity as the administrative agent of the government for the construction of irrigation works and the disposition of the same under the Reclamation Act. (38 Stat. 690, Sec. 15; 43 U. S. C. A., Sec. 373.) The suit, therefore, is one against an agent of the government and not against the government itself, since no complaint is here made by the plaintiffs of the existing contracts between them and the government.

The validity of the contracts between the government and the plaintiffs is not here in issue. The question is whether or not the orders promulgated amount to a valid and enforceable extension of the terms of the contract. If not the orders will be determined as unenforceable and the contracts will remain valid as if the orders had never been issued.

This brings us to the consideration of the authority of the Secretary to issue the orders here in question. The water rights here involved were primarily derived through the contracts of the plaintiffs or their predecessors with the Washington Irrigation Company. Under that authority, and in conformity with the laws of the State of Washington, the plaintiffs acquired sufficient water, beneficially used, to irrigate their lands, and rights were not subsequently modified to any extent by the contracts entered into with the government after the government had acquired the rights of the Washington Irrigation Company. While in two of the contracts here in question the amount is fixed at 3 and one at 3½ feet per acre, this seems to have been put in as a minimum amount, since there was a further qualification permitting of the use of sufficient water to beneficially and successfully irrigate their lands. This is the legal measure of right to use fixed by the laws of the State of Washington and by the Reclamation Act. This amount had been fixed through prior application and use of the water at six feet per acre in the case of Parks, 4.84 feet per acre in the case of Fox, and 5.56 feet per acre in the case of Ottmuller. This amount was found to be necessary to beneficially and successfully irrigate the land; and under Section 7390 Rem. Rev. Stat. of Washington, "the right to the use of water which has been applied to beneficial use in the State shall be and remain appurtenant to the land or place upon which the same is used."

Under the Reclamation Act the United States, in putting in an irrigation enterprise, stands in the same position with relation to the State as a private individual. The waters belong to the State, and the United States never acquires any title therein any more than a private appropriator.

It is settled irrigation law that mere diversion and storage of water does not constitute an appropriation. Before there can be an appropriation the water must be applied to a beneficial use. Highland Ditch Company v. Union Reservoirs Company, 127 Pac. 1025. In Paine Irrigation District v. Board of Commissioners, 236 Fed. 790, the court, considering constitutional and statutory provisions similar to those of the State of Washington, held that under the Constitution and statute relating to water rights, as constructed by the Supreme Court of the State, no property right can be acquired in the use of water until it is applied to a beneficial use. The owner of the carrying ditch gets no title or right to the use of the water and has
59 no property in it subject to disposal, but such property right of disposal is in him who applies the water to beneficial use.

It is clear, therefore, that the United States under the proceedings provided in the Reclamation Act acquires no title to the water. It is

merely a carrier and distributor of the water, and the only title acquired which consists only of a right of use is in the appropriator who applies the water to a beneficial use. To proceed under the Reclamation Act the United States must make application for a permit to appropriate the waters and to distribute it for beneficial purposes. The state does not surrender its right to control its use. The 1,000 cubic feet appropriated in 1891 was appropriated by the application of the water to beneficial use, and under such circumstances the water becomes a part and parcel of the land and is appurtenant thereto. This rule was recognized in the Reclamation Act (43 U. S. C. A., Sec. 372), where it is specifically provided that the water right is appurtenant to the lands irrigated.

Secretary Garfield in 1909, pursuant to 43 U. S. C. A., Sec. 419, made a finding as to the cost of the irrigation system in addition to the purchase price paid the Washington Irrigation Company, and fixed the price at $52.00 per acre, which sum would return to the Reclamation fund the total cost of the Project. A public notice and order was issued fixing this charge. It is alleged that under the administration of the Reclamation Act prior to the action of Mead and Wilbur and the orders here complained of, the Reclamation Act was construed, and the contracts made thereunder were construed, as holding that water users were entitled to a sufficient amount of water to beneficially and successfully irrigate their lands; and that it was determined by successive Secretaries that 4.84 feet per annum was necessary for the Fox land, 5.56 feet for the Ottmuller land, and 6 feet for the Parks land, to beneficially and successfully irrigate the same. In accordance with these ascertained facts, Congress passed the Reclamation Extension Act of August 13, 1914, which, among other things, provides: "No increase in the construction charges shall, after August 13, 1914, be made, after the same have been fixed by public notice, except by agreement between the Secretary of the Interior and a majority of the water-right applicants and entrymen to be affected by such increase. 38 Stats. 687, 43 U. S. C. A. 489.

Pursuant to this Act Franklin K. Lane, then Secretary of the Interior, on September 24, 1914, issued a public notice and order as follows: "The amount of the construction charge per irrigable acre for lands for which entry under the provisions of the Reclamation Act of June 17, 1902 (32 Stats. 388), where water-right application has heretofore been made, shall be the amount fixed in the several public notices heretofore issued for the respective lands and therein termed 'the building charge', and will not be increased, except as provided in said Reclamation Extension Act." It is alleged in substance that the Sunnyside Irrigation District was organized in 1918, and a contract was entered into with the United States under which the District assumed and agreed to pay construction charges to the extent of $2,000,000 and all obligation and maintenance charges. In pursuance of 43 U. S. C. A., Sec. 512, the Secretary released all liens on the lands of said unit for construction, operation, and maintenance charges.

60 The court below was right in overruling the motions to dismiss the bills of the respective plaintiffs, and the order denying the motions is affirmed.

JOSIAH A. VAN ORSDEL,
Associate Justice.

Dissenting opinion

STEPHENS, Associate Justice, dissenting: In my opinion, the United States is a necessary party to these suits; and since it has not consented to be sued, they cannot proceed. Necessary parties are those "affected by the judgment and against which in fact it will operate . . ." Minnesota v. Hitchcock, 185 U. S. 373, 387. Whether or not title to the water in question is in the United States, the latter is a party to contracts to deliver water. If the asserted reductions made by United States officials in the amounts of water to be delivered under the contracts were illegal, then the United States is bound to deliver the former amounts. If the reductions are legal, it is not so bound and may therefore, for a consideration valuable to itself, contract for delivery of the difference to the plaintiffs, if they desire it, or to third parties. The point is, in my opinion, controlled by the principle actuating the decisions in: Payne v. Central Pac. Ry. Co., 255 U. S. 228; Northern Pac. Ry. Co. v. North Dakota, 250 U. S. 135; Wells v. Roper, 246 U. S. 335; Lane v. Watts, 234 U. S. 525; United States v. Lee, 106 U. S. 196; Transcontinental & Western Air v. Farley, 71 F. (2d) 288, certiorari denied, 293 U. S. 603. This principle and the application thereof I discussed in my separate opinion in Township of Franklin et al. v. Rexford G. Tugwell et al., decided by this court May 18, 1936, —— App. D. C. ——, —— F. (2d) ——. In respect of the situation here involved, I think Wells v. Roper and Transcontinental & Western Air v. Farley are in point and controlling.

61 In United States Court of Appeals

* * * * * * *

No. 6541, April term, 1936

HAROLD L. ICKES, SECRETARY OF THE INTERIOR, APPELLANT

v.

MAZINE Z. FOX AND JOSIE R. FOX, HIS WIFE

Judgment

June 8, 1936

Appeal from the Supreme Court of the District of Columbia.

This cause came on to be heard on the transcript of the record from the Supreme Court of the District of Columbia and was argued by counsel.

On consideration whereof, It is now here ordered, adjudged, and decreed by this Court that the order of the said Supreme Court in this cause be, and the same is hereby, affirmed.

Per Mr. JUSTICE VAN ORSDEL.

JUNE 8, 1936.

Dissenting opinion by Mr. Justice STEPHENS.

62 Memorandum: Motion to stay mandate.

Filed June 17, 1936

63 In United States Court of Appeals

* * * * * * *

[Title omitted.]

Order granting motion to stay mandate

July 6, 1936

On consideration of Appellant's motion for a stay of the mandates herein, under Rule 24, pending application for certiorari to the Supreme Court of the United States, It is ordered by the Court that the motion be, and it hereby is, granted.

64 In United States Court of Appeals for the District of Columbia

[Title omitted.]

Designation of record

Filed June 23, 1936

The clerk in the preparation of the transcript of record on petition for certiorari to the Supreme Court of the United States will include the following:

1. Printed record.
2. Note of argument.
3. Opinion of the court.
4. Decree.
5. Memorandum of filing motion to stay mandate.
6. Minute entry granting stay of mandate.
7. This designation.
8. Clerk's certificate.

STANLEY REED,
Solicitor General.

[File endorsement omitted.]

65 [Clerk's Certificate to foregoing transcript omitted in printing.]

66 Supreme Court of the United States

Order allowing certiorari

Filed October 12, 1936

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

U. S. GOVERNMENT PRINTING OFFICE: 1936

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 267

HAROLD L. ICKES, SECRETARY OF THE INTERIOR, PETITIONER,

vs.

PHILLIP LOUIS PARKS, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

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1 [Caption omitted.]

In Supreme Court of the District of Columbia

Equity No. 57739

PHILIP LOUIS PARKS AND OLLIE D. PARKS, HIS WIFE, PLAINTIFFS

vs.

HAROLD L. ICKES, SECRETARY OF THE INTERIOR, DEFENDANT

Bill of complaint for injunction

Filed September 24, 1934

To the honorable Supreme Court of the District of Columbia, holding an equity court:

The plaintiffs respectfully represent that they are citizens of the United States and of the State of Washington, residing near Granger, in Yakima County, Washington, and that their post-office address is Granger, Washington, and that they bring this suit in their own right and in their own behalf against Harold L. Ickes, a citizen of the State of Illinois, residing in the District of Columbia in respect of the matters and things hereinafter set forth.

I

That the plaintiffs are husband and wife and the sole owners and in possession of the following described real estate located within the Sunnyside unit of the Yakima project, to wit: The southeast quarter of the northeast quarter of section 16, township 10 north, range 21 E., W. M., and that there is appurtenant to said land a water right for a sufficient amount of water to beneficially and successfully irrigate the same from the natural flow of the Yakima River and storage reservoirs hereinafter mentioned, constructed under and by virtue of the Reclamation Act herein referred to, and the right to have said water stored and impounded in the reservoirs herein described and carried in said river and in the canals and distribution system of the Sunnyside unit of the Yakima project to said land; that
2 the amount of the water so appurtenant to plaintiffs' land is in excess of six acre-feet per acre per annum, measured at the land during the irrigation season and the absolute title to said water right and said easement vests in the plaintiff and said water and easement are real estate.

II

That the defendant is now and has been since, to wit: March 5th, 1933, the duly appointed, qualified, and acting Secretary of the Interior of the United States, and as such has charge of the adminis-

tration of the laws of the United States relating to irrigation and reclamation projects constructed by the United States, and particularly to the administration of the act of Congress known as the Reclamation Act, being the act of June 17th, 1902 (32 Stat. 388), as amended and supplemented by later acts of Congress, and that said defendant is sued in his official capacity as such Secretary of the Interior as hereinafter set forth.

III

That in 1906, the then Secretary of the Interior approved an irrigation and reclamation project known as the Sunnyside unit of the Yakima project, which included the land herein described and on behalf of the United States of America purchased from the Washington Irrigation Company, the Sunnyside Canal, water appropriations and irrigation system used in connection therewith; that the land herein described at that time had what was known as a Washington Irrigation Company water right, which was equivalent to 2.62 acre-feet per acre per annum, measured at the land; that the Secretary of the Interior, his representatives and subordinates stated that before said project could be purchased or the construction or storage works could be undertaken that the owners of the land herein described and other lands which were being served by said irrigation system should cooperate with the then Secretary of the Interior to the extent of incorporating the Sunnyside Water Users Association and placing their said private lands in said project and agreeing to take water for the purpose of irrigating their lands from said project and that for the purpose of inducing the said owners of said private lands to so cooperate with the then Secretary of the Interior and to incorporate the Sunnyside Water Users Association and to place their lands under said project and agree to purchase an additional water right therefor and execute a stock subscription, it was represented and stated by the then Secretary of the Interior, his representatives and subordinates, that beneficial use was the basis, the measure and the limit of the water right that would be furnished and that as much water would be furnished as would be required to successfully irrigate the land herein described at all times during the irrigation season, save and except in extremely dry years and that the entire cost of building and constructing storage reservoirs and completed works for the land herein described and for said additional water right would be the sum of $10.00 per acre; that said representations and statements so made by the Secretary of the Interior, and by his
3 representatives and subordinates, were made to the predecessors in title of the plaintiffs to said lands for the purpose of persuading them to execute a supplemental water-right contract, a copy of which is hereto attached, marked "Exhibit A" and made a part hereof; that at the time the question as to the amount of water that would be furnished if said supplemental contract was executed and the cost to the owners of said land in the construction and com-

pletion of said project and the annual cost of operation and maintenance were matters of vital importance and were also matters as to which the then owners of the land herein described were not otherwise advised and that were compelled to rely upon the statements and representations of the then Secretary of the Interior and his representatives and subordinates.

IV

That the owner of the land herein described and the predecessors in title of the plaintiff relying absolutely and entirely upon the statements and representations and upon the statements and representations in this complaint set forth, believed them to be true and would not, except for such statements and representations have participated in the incorporating of said Sunnyside Water Users' Association and would not have subscribed for share of stock therein and would not have executed the supplemental water-right contract as herein alleged and purchase a supplemental water right for their said land from said project, but for such statements and representations; that being induced and persuaded thereby, the then owners of the land herein described did execute a supplemental water-right contract, copy of which is hereto attached, marked "Exhibit B" and did participate in the incorporation of the Sunnyside Water Users' Association and subscribed for stock therein.

V

That George L. Allen and Jenettie Allen, his wife, were on August 6th, 1907, the owners in fee simple of the land herein described and were fully qualified under the Reclamation Act to purchase the water right from the United States and said parties did, on August 6th, 1907, execute said supplemental water-right contract, a copy of which is hereto attached, marked "Exhibit —"; that thereafter the plaintiffs acquired all right, title, and interest in and to said land and water right; that the plaintiffs and their predecessors in title paid to the United States the sum of $10.00 per acre and also all operation and maintenance charges that have heretofore accrued and fully complied with all the terms and conditions of said contract on their part and are now the owners of said water right.

VI

That for a period of more than twenty-five years after the execution of said supplemental water-right contract, the Secretaries of the Interior and their representatives and subordinates construed said act of Congress and said contract as requiring the delivery to said land of such an amount of water that was necessary to bene-
4 ficially and successfully irrigate the same, which said amount for a period of more than twenty-five years was actually

determined by the representatives and subordinates of the then Secretaries of the Interior, who were charged with the operation of said irrigation system and the distribution of the water thereon, by going upon said land from time to time and from a factual investigation as to the water requirements of various crops growing or to be planted upon said land; the condition of the soil, climatic conditions, and other facts which said representatives and subordinates obtained upon said personal investigation and examination and that after obtaining said information in such manner said representatives and subordinates made a determination of the amount of water necessary to successfully and beneficially irrigate said land during all times during each irrigation season from the date of said supplemental water-right contract in 1907 until about August 17th, 1934, save and except two years of extreme water shortage, and actually delivered to said land the amount of water so determined to be necessary to beneficially and successfully irrigate the same and the crops growing thereon, which said amount fluctuated from year to year and at different times during the year, depending upon crop requirements and climatic conditions; that the amount of water so determined to be necessary by the Secretaries of the Interior, their representatives, and subordinates to beneficially and successfully irrigate said land and the amount actually delivered each year to said land on an average for more than twenty-five years, was in excess of six acre-feet per acre per annum, measured at the land, which said amount was beneficially used on said land without waste.

VI

That the Reclamation Act under and pursuant to which the then Secretary of the Interior authorized the purchase of the Sunnyside Canal and the building and construction of the reservoirs and distribution system and under and by virtue of which contracts herein referred to were executed and which became a part of each of said contracts gives the following measure of a water right for said land, to wit: "That the right to the use of water acquired under the provisions of this act shall be appurtenant to the land irrigated and beneficial use shall be the basis, the measure, and the limit of the right", that the contract between the then Secretary of the Interior acting for the United States and the Sunnyside Water Users' Association herein referred to expressly provides: "That in all the relations between the United States and this association and the members of the association, the rights of the members of the association to the use of water where the same have vested, are to be defined, determined, and enjoyed in accordance with the provisions of the said act of Congress and of other acts of Congress on the subject to the acquisition and enjoyment of the rights to use water, and also by the laws of the State of Washington, where not inconsistent therewith, modified, if modified at all, by the provisions of the articles of incorporation and bylaws of the said association", that

under the decisions of the Supreme Court of the State of Washington where water is beneficially used upon lands for irrigation purposes, the same becomes appurtenant to the land on which the water is so used and said water cannot be diverted from said land without the consent of the owner thereof, and said water right is real estate.

VII

That the plaintiff and his predecessors in title to said land and water right relying upon the statements and representations as herein alleged, made by the then Secretary of the Interior, his representatives and subordinates, and the determination made by the Secretaries of the Interior, their representatives and subordinates, as to the amount of water actually necessary to beneficially and successfully irrigate said land over a term of years and the actual delivery by said representatives and subordinates of the Secretaries of the Interior of the amount of water so determined to be necessary to successfully irrigate said land, joined with other water users in said Sunnyside unit in 1918 in the organization and incorporation of the Sunnyside Valley Irrigation District and authorized said district to enter into contract with the United States of America, by the terms of which, the land herein described was bound to pay the charges of all other land in said unit and in said district in the event the owner thereof did not pay to the extent of $2,000,000.00.

VIII

In the practical administration of said project the Secretaries of the Interior, their representatives and subordinates, have for a period of twenty-five years consistently construed the Reclamation Act and said supplemental water-right contract to require the delivery to said land herein described of that amount of water during the irrigation season which was necessary to beneficially and successfully irrigate the same and that the determination as to the amount was to be made by the subordinates of the Secretary of the Interior who were in charge of said project and had supervision of the distribution of the water therein, by going upon the land from time to time and from a factual investigation as to the water requirements of the crop or crops growing or to be grown thereon, condition of the soil, climatic conditions and other facts obtained from said investigation, and the delivery by said subordinates of the amount found necessary to successfully irrigate said land; that said representatives and subordinates found that about six acre-feet of water per acre per annum measured at the land was necessary to beneficially and successfully irrigate the same and in the operation of said project have consistently for a period of more than twenty-five years actually delivered the amount of water so determined to be necessary to beneficially irrigate said land without requiring any additional payment and

without requiring a payment in excess of $1.00 per acre operation and maintenance charges as provided in said contract and have consistently construed the term used in paragraph 8 of said supplement water right contract "the amount so required to be determined by the authorized agent of the United States" to mean the subordinates of the then Secretary of the Interior who had charge of said project and distribution of water therein and that said determination is to be made from time to time as the necessity therefor might arise and from a factual investigation as herein alleged.

X

That the defendant made an order and ruling that unless the plaintiff signed a contract to pay rental for all water in excess of three acre-feet, that no water above said amount would be permitted to flow on his land, and that the same would be diverted, and notified the plaintiff that unless he signed the water rental application for water in excess of three acre-feet per acre, per annum, measured at the land, in the words and figures following, to wit:

"WATER RENTAL APPLICATION

"The undersigned applicant requests excess water under public notice issued by the Secretary, February 19, 1932, and agrees to pay applicable charges, with 6% interest from December 1, 1934, until paid. He further agrees that water may be withheld from his land after 1934 until such charges are paid. It is understood that advance payment will be required in 1935 if the 1934 rental charge remains unpaid at that time.

"Witness:

"_____ _____

"_____ _____

"*Water User.*"

that no water in excess of three acre-feet per acre per annum would be delivered to the land herein described; that the head gates would be shut down to the land herein described to three and one-half acre-feet per acre per annum, measured at the land; that the defendant, as Secretary of the Interior of the United States, his representatives and subordinates acting under his direction, contrary to the terms of the Reclamation Act herein referred to, contrary to the terms of said supplemental water-right contract, contrary to the practical construction of said contract as to the amount of water necessary to beneficially and successfully irrigate said land and as to the method and manner of making said determination by the subordinates of the Secretary of the Interior in charge of said unit, who were charged with the distribution of the water therein and contrary to the decisions of the Supreme Court of the State of Washington, did, on or about August 17th, 1934, shut off the supply of water to the land of

the plaintiffs herein described in excess of three and one-half acre-feet per acre per annum, measured at the land; that at the time said head gates were so shut down ample water was available and in storage reservoirs and flowing in the Yakima River and in the Sunnyside Canal and laterals flowing therefrom to furnish said land and all other land within the Sunnyside Unit of the Yakima project and to furnish all other lands entitled to receive water from said reservoirs and from the Yakima River to successfully and beneficially irrigate the same during the remainder of the irrigation season of 1934 and leave a surplus of 400,000 acre-feet unused in said resevoirs.

XI

That the shutting down of said head gates on August 17th, 1934, of more than 40% of the water necessary to beneficially and
7 successfully irrigate said land and which was diverted therefrom was vested in the plaintiff and appurtenant to said land; that the title to said water vested in the plaintiff as soon as it was impounded in storage reservoirs and when it was flowing in the Yakima River, in Sunnyside Canal and irrigation system; that the plaintiffs were the owners of an easement in said irrigation system necessary for the purpose of carrying said water to said land and that the representatives and subordinates of the defendant who were in charge of said irrigation system and who had charge of the delivery of the water so owned by the plaintiffs, were merely performing a ministerial and executive duty in delivering said water to the plaintiffs prior to the time said head gates were shut down; that it is the executive and ministerial duty of said representatives and subordinates to open said head gates and to permit the water owned by the plaintiffs to flow thereon, and the defendant by his acts as herein alleged, prevented them from performing that duty and tended to bring the United States into disrepute.

XII

That the order and ruling requiring a new contract in the form of water-rental application to be entered into as hereinabove alleged and set forth and the acts of the defendant and his representatives and subordinates in shutting down the head gates to three and one-half acre-feet per acre per annum, measured at the land and diverting from plaintiff's land and not permitting to flow thereon, the remainder of the water owned by him, were arbitrarily made and done and were not made in good faith and were made without regard to and in violation of the act of Congress aforesaid, the contract referred to herein being a supplemental water-right contract, the practical construction of said act of Congress and contract between the then Secretaries of the Interior, their representatives and subordinates acting under their direction for a period of more than twenty years and without regard to the determination made by the repre-

sentatives and subordinates of the then Secretaries of the Interior as to the amount of water necessary to successfully and beneficially irrigate said land and the amount of water that was actually delivered to said land for a period of twenty-five years and without regard to the determination made by the representatives and subordinates of the then Secretaries of the Interior as to the amount of water necessary to successfully and beneficially irrigate said land and the amount of water that was actually delivered to said land for a period of twenty-five years prior to said date and without regard as to the amount of water actually available or necessary to beneficially and successfully irrigate said land and without regard to the decisions of the Supreme Court of the State of Washington to the effect that where water is beneficially used to irrigate land it becomes appurtenant thereto; that in making said ruling requiring said water-rental contract to be executed and in shutting down the head gates as aforesaid the defendant, his representatives and his subordinates acting under his direction, failed to exercise an honest judgment and failed to exercise any judgment whatever and failed to exercise good faith and arbitrarily made said order and arbitrarily shut down said head gates for the express purpose and intent
8 of coercing and forcing the plaintiff and other owners of land in the Sunnyside unit of the Yakima project and located within the Sunnyside Valley Irrigation District to authorize said district to enter into contract with the United States of America to purchase a supplemental water right for their said lands, including the land herein described, over and above the water rights theretofore purchased at a cost of $1,000,000.00 and binding the last faithful acre of land in said district and the land herein described to pay said sum and all of said acts were contrary to the terms of and in violation of the terms of the Reclamation Act herein referred to and in violation of the terms of the contracts herein referred to and in violation of the construction of said act of Congress and contracts by the Secretaries of the Interior and their representatives and subordinates acting under their direction for a period of more than twenty-five years and in violation of the practical determination by the representatives and subordinates of the Secretaries of the Interior over a period of twenty-five years as to the amount of water necessary to successfully and beneficially irrigate said land or the amount that could be beneficially used thereon or the amount of water available for the irrigation thereof and were arbitrary and unreasonable and were not made or done in good faith and the effect of said acts by the defendant, his representatives and subordinates, was to deprive the plaintiff of more than 40% of the water owned by him and which was appurtenant to his said land and in violation of vested rights of the plaintiff.

XIII

That there was on August 17th, 1934, and has been at all times since said date, an ample supply of water available to furnish the

plaintiff the water necessary to beneficially and successfully irrigate his said land and to beneficially and successfully irrigate all lands in the Sunnyside unit of the Yakima project and all other lands entitled to receive water from said storage reservoirs and from the Yakima River and said water has been actually impounded in said storage reservoirs and a portion of which was diverted from the Yakima River and was flowing in the main Sunnyside Canal and laterals leading therefrom at the time the head gates were shut down as aforesaid.

XIV

That the plaintiffs are informed and believe and therefore assert that Harold L. Ickes, as Secretary of the Interior, his representatives and subordinates, intend and purpose to continue keeping the head gates to plaintiffs' land closed and locked so that not more than three and one-half acre-feet of water per acre per annum will be permitted to flow on plaintiffs' land and to continue to divert and destroy the remainder of the water owned by the plaintiffs, to wit: To divert and destroy about two and one-half acre-feet of the water owned by the plaintiff.

XV

That the threatened acts of Harold L. Ickes, Secretary of the Interior, his representatives and subordinates, to continue
9 keeping the head gates closed so that not to exceed three and one-half acre-feet of water will flow on said land and diverting and destroying the remainder of the water belonging to the plaintiffs is unwarranted, arbitrary, and illegal, and that if consummated it will deprive the plaintiffs of valuable property rights acquired in good faith by virtue of the Reclamation Act, contract with the Sunnyside Water Users' Association, practical construction of said act of Congress and contract by the then Secretaries of the Interior and their representatives and subordinates for a period of twenty-five years as to the amount of water that plaintiffs and their predecessors in title were entitled to receive from said water supply and the amount necessary to beneficially and successfully irrigate said land and the amount of water delivered thereto and the rights acquired by the beneficial application of said water to said land for a period of more than twenty-five years, by virtue of which, under the laws of the State of Washington, which are applicable, the title to the amount of water necessary to beneficially irrigate said land vested in the plaintiff and further, in that the said Harold L. Ickes, Secretary of the Interior, his representatives and subordinates, are without power or authority to set aside the practical construction by his predecessors in office, their representatives and subordinates in the determination of the amount of water plaintiffs were entitled to receive under said act of Congress and said contract, and the

plain wording of said act of Congress and said contract, and to nullify the decisions of the Supreme Court of the State of Washington to the effect that where water is beneficially used upon it it becomes appurtenant to the land the title vests in the owners of said land.

XVI

That plaintiffs have no plain, adequate, or complete remedy at law and effective relief can only be administered in a court of equity. The injury to plaintiff is not measurable in damages and is irreparable and cannot be compensated for in an action at law.

XVII

That this suit arises under the Constitution and laws of the United States and involves the construction of the Constitution of the United States, acts of Congress, and the construction of contracts entered into by the United States of America; that the amount of the value of the matter in controversy herein between the plaintiffs and the defendant exceeds the sum of $3,000.00, exclusive of interests and costs.

Wherefore, the plaintiffs pray:

1. That the process of this court issue directed to the defendant Harold L. Ickes, Secretary of the Interior, requiring him to appear and make answer to the foregoing bill of complaint, but not under oath, answer under oath being hereby expressly waived.

2. That upon the filing of this bill or at such time thereafter as shall be fixed by the court, a preliminary order may issue herein enjoining pendente lite, the defendant, his successors in office and each and every and all persons claiming to act under his authority and control from diverting from plaintiffs' land, any portion of the water owned by him and requiring the head gates to plaintiffs' land to be adjusted that the amount of water owned by plaintiff and which he is entitled to have flow on said land may flow thereon and requiring him to desist from enforcing the orders heretofore issued by him requiring the execution of said water rental application prior to the delivery to said land of water in excess of three and one-half acre-feet and that upon the final determination of this action such injunctive order be made perpetual and permanent.

3. That the plaintiff may have such other and further relief as the nature of the case may demand and require and may be agreeable to equity.

STEPHEN E. CHAFFEE,
Attorney for Plaintiffs.
PRESTON B. KAVANAGH,
P. C. KING, Jr.,
Attorneys for Plaintiffs.

[*Duly sworn to by Philip L. Parks; jurat omitted in printing.*]

Exhibit A to complaint

CONTRACT BETWEEN THE SUNNYSIDE WATER USERS ASSOCIATION AND THE SECRETARY OF THE INTERIOR

These articles of agreement, made and entered into this 7th day of May 1906, by and between the United States of America, acting in this behalf by E. A. Hitchcock, Secretary of the Interior, party of the first part, and the Sunnyside Water Users Association, a corporation duly organized and existing under the laws of the State of Washington, party of the second part, their successors and assigns, witnesseth:

That whereas the Sunnyside Water Users Association is a corporation organized and existing under the laws of the State of Washington for the purposes mentioned in its articles of incorporation and bylaws, a copy of which is appended to this agreement and is, for every purpose of the interpretation, construction, and consideration of this agreement and of the rights of the parties hereunder, to be deemed, held, read, and considered as if fully written out or printed herein, and deemed a part hereof; and

Whereas the lands embraced within the area proposed to be irrigated as described in said articles of incorporation or bylaws are naturally desert and arid and incapable of proper cultivation without irrigation, and will to a greater or less extent remain unreclaimed, unfit for habitation, and uncultivation, in which condition they, or a great part thereof now are, unless the waters of the Yakima River in the State of Washington, and its tributaries be impounded and the flow thereof otherwise regulated and controlled; and

11

Whereas the Secretary of the Interior contemplates the construction of certain irrigation works under the provisions of an act of Congress entitled "An act appropriating the receipts from the sale and disposal of public lands in certain States and Territories to the construction of irrigation works for the reclamation of arid lands", approved June 17, 1902, for the irrigation and reclamation of the lands described in the said articles or bylaws; and

Whereas the incorporators and shareholders of said Sunnyside Water Users Association are, and under the provisions of its articles of incorporation and bylaws must be, owners and occupants of lands in said area, and in some cases are appropriators of water for the irrigation thereof, and in addition thereto such incorporators and shareholders and their successors or assigns must initiate rights to the use of water from the said proposed irrigation works, to be constructed by the Secretary of the Interior as soon as such rights may be initiated, and thereafter complete the acquisition thereof in the manner and upon the terms and conditions to be prescribed therefor by the Secretary of the Interior, which rights shall be, and thereafter continue to be, forever appurtenant to designated lands owned by such shareholders; and

Whereas neither the relative priority nor the extent of the individual appropriations of such water heretofore made by said incorporators and shareholders for the lands described in said articles or bylaws, and which are now vested rights, have been ascertained or determined, but said incorporators and shareholders have agreed, among themselves, by the terms and provisions of said articles of incorporation and bylaws, upon the rules and principles by and upon which the relative priority and the extent of their several appropriations and vested rights to the use of such waters shall be determined:

Now, therefore, it is agreed and understood by and between the parties hereto—

1. That if the Secretary of the Interior shall authorize and cause the construction of said irrigation works, the said association will take prompt action to secure the determination by the courts of the relative rights of its shareholders to the use of water for said lands, and that in the determination of such rights and of their respective rights to the use of water acquired under said act of Congress the rules and principles set out in said articles of incorporation and bylaws, for such determination, shall be deemed the established rules and principles for that purpose.

2. That only those who are or who may become members of said association, under the provisions of its articles of incorporation and bylaws, shall be accepted as applicants for rights to the use of water available by means of said proposed irrigation works.

3. That the aggregate amount of such rights to be issued shall, in no event, exceed the number of acres of land capable of irrigation by the total amount of water available for the purposes being 12 (1) the amount now appropriated by the shareholders of the said association, and (2) the amount to be delivered from all sources in excess of the water now appropriated; and that the Secretary of the Interior shall determine the number of acres so capable of such irrigation as aforesaid, his determination to be made upon due and expert consideration of all available data, and to be based upon and measured and limited by the beneficial use of water.

4. That the payment for the water rights to be issued to the shareholders of said association, under the provisions of said act of Congress, shall be divided into not less than ten annual payments, the first of which shall be payable when the water is first delivered from said works, or within a reasonable time thereafter, and after due notice thereof by the Secretary of the Interior to the association and that the cost of said proposed irrigation works shall be apportioned equally per acre among those acquiring such rights.

5. That the said Water Users Association hereby guarantees the payments for that part of the cost of the irrigation works which shall be apportioned by the Secretary of the Interior to its shareholders, and will promptly levy calls or assessments therefor and for the cost of maintenance and operation as may be assessed from year to year by the Secretary of the Interior and collect or require prompt pay-

ment thereof in such manner as the Secretary of the Interior may direct; that it will promptly pay the sums collected by it to the receiver of the local land office for the district in which said lands are situated; that it will promptly employ the means provided and authorized by the said articles of incorporation or bylaws for the enforcement of such collections, and will not change, alter, or amend its articles of incorporation or bylaws in any manner whereby such means of collection, or the lien given to it by the shareholders to secure the payment thereof, or of any assessments contemplated or authorized thereby, shall be impaired, diminished, or rendered less effective, without the consent of the Secretary of the Interior.

6. That the United States shall in no manner be responsible for the sums collected by said association until they have been paid into the hands of the receiver of the local land office, as provided by the law, and in accordance with such regulations as may be prescribed by the Secretary of the Interior.

7. That for the purpose of enforcing said collections, the association will adopt and enforce proper bylaws, subject to the approval of the Secretary of the Interior and not change them so as to in anywise impair their efficiency for said purpose, and will otherwise do any and all things it is authorized and empowered to do in the premises.

8. That the association will adopt and enforce such rules and regulations as it is authorized by its articles of incorporation and bylaws to adopt and enforce, concerning the use of water by its shareholders and concerning the administration of the affairs of the association, to effectually carry out and promote the purposes of its organization, within the provisions of said articles of incorporation and bylaws, which rules and regulations shall be subject to the approval of the Secretary of the Interior, and that if the association fail to make and adopt such rules and regulations then the Secretary of the
13 Interior may prescribe them; but in such event the Secretary of the Interior shall impose no rule or regulation interfering with any vested right of the shareholders of the association, as defined or modified by said articles of incorporation and bylaws.

9. That persons who are not now members of the association but who may be the owners or occupants of land to be irrigated, as described in its articles of incorporation or bylaws, or of added lands as therein provided for and to whom rights to the use of water from the proposed irrigation works may be issued by the United States, may be at the designation of the Secretary of the Interior, become members of the association upon subscribing to the stock thereof and upon compliance with the other conditions for such membership.

10. That in all the relations between the United States and this association and the members of the association, the rights of the members of the association to the use of water where the same have vested, are to be defined, determined, and enjoyed in accordance with the provisions of the said act of Congress and of other acts of Congress on the subject of the acquisition and enjoyment of the rights to

use water, and also by the laws of the State of Washington, where not inconsistent therewith, modified, if modified at all, by the provisions of the articles of incorporation and bylaws of said association.

11. That nothing contained in this agreement, or to be implied from the fact of its execution, shall be construed, held, or deemed to be an approval by the Secretary of the Interior, nor an adoption by him of the articles of incorporation or bylaws of said association in all their details as the form of organization of water users contemplated and authorized by section 6 of the said act of Congress of June 17, 1902, but such approval and adoption is expressly reserved until the conditions prescribed in said act authorizing such approval and adoption shall have arisen; and that when the Secretary of the Interior shall make, approve, and promulgate rules and regulations for the administration of the water to be supplied from said proposed irrigation works, such rules and regulations and such modifications thereof as the Secretary may, from time to time approve and promulgate, shall be deemed and held to be obligatory upon this association as fully and completely, and to every intent and purpose as if they were now made, approved, promulgated, and written out in full in this agreement, and the same are to be so read and construed.

In witness whereof, the undersigned have hereunto subscribed their names and affixed their seals the day and year first herein written.

Department of the Interior:

THOS. RYAN,

Secretary of the Interior acting for and on behalf of the United States of America, party of the first part.

Attest:

E. J. YOUNG, *Secretary.*

Sunnyside Water Users Association, Incorporated 1906, Washington.

SUNNYSIDE WATER USERS ASSOCIATION,

By S. J. HARRISON, *President, party of the second part.*

14 STATE OF WASHINGTON,

County of Yakima, ss:

Be it remembered, that on this 7th day of May, 1906, before me, the undersigned, a notary public in and for said county and State, personally appeared S. J. Harrison and E. J. Young, to me personally known to be the president and secretary, respectively, of the corporation, to wit, Sunnyside Water Users Association, that executed the within and foregoing instrument, and acknowledged the said instrument to be the free and voluntary act and deed of said corporation, for the uses and purposes therein mentioned, and on oath stated that they were authorized to execute said instrument and that the seal affixed is the corporate seal of said corporation.

In witness whereof I have hereunto set my hand and affixed my official seal the day and year first above written.

WM. B. BRIDGMAN,

Notary Public for Washington, Residing at Sunnyside.

Exhibit B to complaint

Irrigation Company W. Con. #141. Book 2, page 115.

GOVERNMENT WATER-RIGHT CONTRACT

Department of the Interior, United States Reclamation Service

This agreement, made and entered into this sixth day of August, one thousand nine hundred and seven, by and between the United States of America, acting in this behalf by Walter N. Granger, irrigation manager, engineer, United States Reclamation Service, thereunto duly authorized by the Director of the United States Reclamation Service and subject to the approval of the Secretary of the Interior, party of the first part, and Geo. Allen, and Jennettie Allen, his wife, of Alfalfa, Yakima County, State of Washington, parties of the second part, their heirs, executors, administrators, successors, and assigns.

Whereas, in pursuance of the act of Congress approved June 17, 1902 (32 Stat. 388), entitled "An act appropriating the receipts from the sale and disposal of public lands in certain States and Territories to the construction of irrigation works for the reclamation of arid land", the United States has purchased the irrigation system of the Washington Irrigation Company and proposes to enlarge the system and supplement the same by storage reservoirs, forming the Sunnyside project, and

Whereas the party of the second part has heretofore entered into contract with the Washington Irrigation Company for water for irrigation for the following-described lands, to wit: The southeast quarter of the northeast quarter (SE¼NE¼) of section sixteen (16) township ten (10) north, range twenty-one (21- east, W. M., containing forty acres; and

Whereas a condition of said contract is that the amount of water to be furnished for said lands shall not exceed one cubic foot of water per second for each 160 acres; and

15 Whereas the party of the second part desires to obtain the benefits of the storage connected with the Sunnyside project, the benefits of the better distribution of the water supply through the irrigation season, the benefits derived from the enlargement and improvement of the present Sunnyside irrigation system, an increased water supply over the existing contract allowance, an eventual reduction of maintenance charges when the improved system is completed or within a period not exceeding five years and the better security of operation and facilities afforded for draining wet lands through the construction of wasteways;

Now therefore, the parties hereto have mutually covenanted and agreed, and by these presents do covenant and agree with each other as follows:

1. That in consideration of the premises the party of the second part hereby agrees to pay to the special fiscal agent of the Reclamation Service assigned to the Sunnyside project, or such other officer of the United States as may be duly authorized to receive the same, the sum of $10.00 per acre for the benefits to be derived from said project of the United States, the water for the said lands to be furnished in such amount and distributed through the irrigation season as in the case of other like lands in such project which are subject to the provisions of the Reclamation Act, in full consideration for the water to the use of which the party of the second part is entitled in pursuance of his said contract with the Washington Irrigation Company or its predecessors in interest. The party of the second part further agrees to pay to the special fiscal agent or other proper officer, such annual maintenance charges as may be levied by the Secretary of the Interior under the provisions of the Reclamation Act against other like lands in the said project.

2. The party of the second part further agrees to pay the said sum of $10.00 per acre in five annual installments, the first of which shall become due and payable within 60 days from the date of this agreement, and subsequent payments shall become due and payable on or before the first of December of each year after the present year until fully paid.

3. The party of the second part further agrees to pay within 10 days from the date of this agreement the sum of one dollar ($1.00) per acre, as maintenance charges for the irrigation season of 1907, unless such payment has already been made and agrees to pay the annual maintenance charges hereafter assessed against like lands in the project, on or before the date when the same shall be due, not to exceed one dollar ($1.00) per acre.

4. In case of failure to make any of said payments when due, the United States shall be authorized and empowered to refuse to deliver water for any of the lands herein described until such payments have been made in full, with legal interest as provided by the State law, from the date when the same is due.

5. The party of the second part hereby agrees within 30 days from the date hereof to subscribe to the stock of the Sunnyside Water Users' Association for all the lands hereinbefore described, and in case the party of the second part elects to pay the $10.00 per acre in more than one installment and the lands held by him under the project exceed in area 160 acres, it is understood and agreed that he will execute an excess holding contract with the Sunnyside Water Users' Association in the form heretofore adopted by said association and will agree that the power of sale therein conferred

16

upon the water users' association shall be exercised within one year from the date of this contract, unless the party of the second part shall have sold the excess over 160 acres to some person or persons qualified to perfect a water right under the provisions of the Reclamation Act.

6. It is further understood and agreed that the power of sale conferred by the said excess holding contract shall remain in full force and effect until such excess lands shall be held by parties duly qualified in tracts not exceeding 40 acres or 80 acres, in accordance with the classification of lands shown upon the map on file in the office of the project engineer at North Yakima, Washington, said map having shown thereon the areas within which individual holdings shall be limited to 40 acres and 80 acres, respectively, when the lands are subdivided as excess holdings, or are entered under the public land laws. The said excess holding contract shall be modified in accordance with these provisions.

7. It is understood and agreed that this contract shall serve the purposes of the water-right application provided for in section 6 of the stock subscription and contract of the Sunnyside Water Users' Association, and the party of the second part is hereby expressly relieved of the necessity of making such water-right application.

8. The amount of water to be furnished hereunder shall be three acre-feet of water per annum per acre measured at the land, or as much more water as will be required to successfully irrigate the land, the amount so required to be determined by the authorized agent of the United States, and the water shall be used only to irrigate said lands and for domestic purposes incident thereto; provided, that the amount of water furnished shall be limited to the amount beneficially used upon such lands.

9. It is further understood and agreed that the party of the second part will conform to the rules and regulations concerning the distribution and measurement of water and the construction, operation, and maintenance of laterals now or hereafter adopted for the project.

10. It is further expressly understood that the United States shall not be responsible for the failure to supply water under this contract, caused by insufficient supply of water in the Yakima River due to hostile diversion or unusual drought, nor for damage caused by floods, acts of hostility, or unavoidable accidents.

11. It is further expressly understood that no Member of or Delegate to Congress, officer, agent, or employee of the Government is or shall be admitted to any share or part of this contract, or to any benefits which may arise therefrom, and the provisions of sections

3739, 3740, 3741, and 3742 of the Revised Statutes of the United States, relating to contracts, enter into and form a part of this agreement, so far as the same may be applicable.

17 In witness whereof, the undersigned have hereunto subscribed their names in duplicate the day and year first above written.

Two witnesses to each signature:

WALTER N. GRANGER,
Irrigation Mgr., Engineer U. S. R. S. For and on Behalf of the United States of America, Party of the First Part.

E. M. PHILEBAUM,
P. O. Address, Zillah, Wn.
KATHLEEN CASTEEL,
P. O. Address, Zillah, Wn.

GEO. ALLEN,
JENNETTIE ALLEN,
Party of the Second Part.

J. W. DAY,
P. O. Address, Zillah, Wn.
E. M. PHILEBAUM,
P. O. Address, Zillah, Wn.

NOTARIAL ACKNOWLEDGMENT

STATE OF WASHINGTON,
County of Yakima, ss:

I, the undersigned, a notary public in and for the aforesaid State and county, do hereby certify that on this 28th day of December, 1907, personally appeared before me Geo. Allen and Jennettie Allen, his wife, to me known to be the identical individuals described in and who executed the within instrument and acknowledged that they signed the same as their free and voluntary act and deed, for the uses and purposes therein mentioned.

In witness whereof, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

E. M. PHILEBAUM,
[SEAL]
Notary Public for the State of Washington, residing at Zillah.

My commission expires Oct. 15, 1911.

AFFIDAVIT OF DISINTERESTEDNESS

STATE OF ------,
County of ----, ss:

I do solemnly swear (or affirm) that the copy of contract hereto annexed is an exact copy of a contract executed by me, personally, with ------; that I made the same fairly without any benefit or advantage to myself, or allowing any such benefit or advantage

corruptly to the said _____ or any other person or persons; and that the papers accompanying include all those relating to the said contract, as required by the statute in such case made and provided.

_____ _____,
Engineer, U. S. R. S.

18 Subscribed and sworn to before me at _____ this _____ day of _____, A. D. 19__.

My commission expires _____.

[OFFICIAL SEAL] _____ _____.

NOTE.—This affidavit should not be executed on an original, and it will be unnecessary to have it executed on more than one copy of the contract.

In Supreme Court of District of Columbia

Order permitting amendment to bill of complaint

Filed January 2, 1935

* * * * * * *

Upon consideration of the plaintiff's motion made in open court and it appearing that the defendant, through his attorney, consents thereto, it is, this 2d day of January, 1935,

Ordered, adjudged, and decreed that the plaintiffs be, and they hereby are, permitted to file an amendment to the bill of complaint heretofore filed by them in the above described cause.

JESSE C. ADKINS, *Justice.*

The foregoing order is hereby consented to this 27th day of December 1934.

J. KENNARD CHEADLE,
Attorney for Defendant.

In Supreme Court of District of Columbia

Amendment to bill of complaint

Filed January 2, 1935

* * * * * * *

Comes now the plaintiffs, by their attorneys, and having obtained leave of this court therefor, amend the bill of complaint filed by them herein, as follows:

I

At the end of paragraph XIII of the bill of complaint, add the following:

"That three acre-feet of water per acre is not now, never has been, and will not in the future be, sufficient to beneficially irrigate the land belonging to the plaintiffs herein."

II

Insert the following paragraph in lieu of paragraph XVI of the bill of complaint:

"That a maximum of three acre-feet of water per acre furnished the land of the plaintiffs would enable them to beneficially irrigate about one-half of their said land, leaving the other one-half thereof barren and nonproductive, thereby forcing one-half of the land belonging to plaintiffs to bear the construction and main-
19 tenance charges for the whole tract of land. That if plaintiffs attempted to spread a maximum of three acre-feet of water per acre over the whole tract of land belonging to them, they would not have sufficient water to grow any profitable crop and their land would be completely destroyed for farming purposes, causing them to suffer irreparable loss and damage which could not be compensated for in an action at law, and plaintiffs have no adequate or complete remedy at law and effective relief can only be administered in a court of equity."

PHILIP LOUIS PARKS.
OLLIE D. PARKS.

STEPHEN E. CHAFFEE.
P. C. KING, JR.
PRESTON B. KAVANAGH.

[*Duly sworn to by P. L. Parks and O. D. Parks; jurat omitted in printing.*]

In Supreme Court of District of Columbia

Motion to dismiss

Filed February 8, 1935

* * * * * * *

Comes now Harold L. Ickes, Secretary of the Interior, the defendant in the above-entitled cause, and moves to dismiss the above entitled cause and the plaintiffs' amended bill of complaint in said cause upon each and every of the following grounds:

1. That the defendant has no individual interest in the controversy, and the relief sought against him is in his official capacity only, as a representative of the Government, which alone is to be affected by any decree herein, wherefore this suit, as manifest upon the face of the amended bill of complaint, is essentially and substantially a suit against the United States, beyond the jurisdiction of the court.

2. That the amended bill of complaint and the exhibits attached thereto and made a part thereof show that this suit is brought on contracts to which the United States is a party and that the decree prayed for would affect the interest of the United States in said contracts and the property of the United States, whereof the court is without jurisdicion.

3. That it is manifest, upon the face of the amended bill of complaint, that the plaintiffs seek, in substance and effect, a decree for specific performance by the United States of alleged obligations under its contracts, whereof the court is without jurisdiction.

20 4. That it appears by the amended bill of complaint that the plaintiffs have a plain, adequate, and complete remedy at law, if they have any right.

5. That it is manifest, upon the face of the amended bill of complaint, that the relief prayed for therein would necessarily involve continued and detailed supervision by this court, for a long and indefinite period, of the performance of contract duties that require the exercise of personal judgment and technical skill, wherefore said bill lacks equity.

Wherefore, the defendant, Harold L. Ickes, Secretary of the Interior, prays that the above-entitled cause be dismissed, that the amended bill of complaint in said cause be dismissed, and that he be permitted to go hence without day, be for nothing held and recover of the plaintiffs his costs.

NATHAN R. MARGOLD,
Solicitor, Department of the Interior,
CHARLES FAHY,
First Assistant Solicitor, Department of the Interior,
J. KENNARD CHEADLE,
Assistant Solicitor, Department of the Interior,
HOWARD R. STINSON,
Assistant Solicitor, Department of the Interior,
Attorneys for defendant.

Service of above motion acknowledged this 8th day of February 1935.

P. C. KING, JR.,
Atty. for Plaintiff.

In the Supreme Court of the District of Columbia

Memorandum opinion

Filed April 1, 1935

* * * * * * *

In each of these cases the bill seeks to compel the defendant to carry out an executor's contract of the United States. I think that the cases of the Boeing Air Transport, Inc., v. Farley, and Wells v. Roper are controlling. The defendant, as Secretary of the Interior, is in control of the irrigation project and the effect of granting to the plaintiffs the relief sought would be to specifically enforce contracts of the United States.

The bills will be dismissed with costs.

BAILEY, *J.*

In the Supreme Court of the District of Columbia

Order dismissing bill of complaint, as amended, &c.

Filed April 19, 1935

* * * * * * *

The above-entitled cause having come on to be heard the 29th day of March 1935, on the defendant's motion to dismiss for lack of jurisdiction in this court to entertain said cause; and at
21 said time the parties thereto having appeared in open court by their respective attorneys and the arguments of said attorneys having been heard, the matter having been submitted and taken under advisement by this court, and the same having been carefully considered, the court being fully advised in the premises: It is hereby

Ordered, adjudged, and decreed this 19th day of April 1935, that the defendant's motion to dismiss be and the same hereby is granted, and that the bill of complaint, as amended, filed herein be and the same hereby is dismissed, with leave to file, within fifteen days from the date hereof, a motion for leave to amend, accompanied by the proposed amended bill of complaint.

JENNINGS BAILEY, *Justice.*

Consent as to form:
P. C. KING, Jr.,
Atty. for Plaintiff.

In Supreme Court of District of Columbia

Motion for leave to amend

Filed April 29, 1935

* * * * * * *

Now come plaintiffs, pursuant to an order heretofore entered in this cause, on the 19th day of April, dismissing the bill of complaint then on file and giving the plaintiffs fifteen days to file a motion for leave to amend, accompanied by the proposed amended bill of complaint, and move the court for leave to file the proposed amended bill of complaint attached to this motion, for reasons set forth in the memorandum of points and authorities filed in support of this motion.

STEPHEN E. CHAFFEE,
PRESTON B. KAVANAGH,
PRESTON C. KING, Jr.,
Attorneys for Plaintiffs.

NATHAN R. MARGOLD,
CHARLES FAHY,
J. KENNARD CHEADLE,
Attorneys for Defendant.

Please take notice that the plaintiffs have filed a motion for leave to amend, accompanied by the proposed amended bill of complaint, and have filed a memorandum of points and authorities in support thereof. Under the rules of the this court you must within five days after the service of this motion, together with the points and authorities in support thereof and the amended bills of complaint upon you, file a memorandum of points and authorities in opposition to this motion or the same will be taken as conceded.

STEPHEN E. CHAFFEE,
PRESTON B. KAVANAGH,
PRESTON C. KING, Jr.,
Attorneys for Plaintiffs.

22 In Supreme Court of District of Columbia

Memorandum opinion

Filed June 1, 1935

* * * * * * *

It appears from the proposed amended bills that the orders made by the defendant are not authorized by Congress, and had they been so authorized would have deprived the plaintiffs of vested rights. The suits are not brought against the United States, but to set aside unauthorized acts of the defendant in cases in which he has no discretionary powers, and is acting arbitrarily.

The motions for leave to file the amended bills will be granted.

BAILEY, *J.*

In Supreme Court of District of Columbia

Order granting leave to amend

Filed June 3, 1935

* * * * * * *

The above-entitled cause having come on to be further heard on the plaintiffs' motion for leave to amend, said motion having been filed pursuant to leave granted in the order of this court, entered therein the 19th day of April 1935, dismissing the bill of complaint, as amended, theretofore filed therein; and the parties thereto having appeared in open court by their respective attorneys and the arguments of said attorneys on said motion having been heard, the matter having been submitted, and the court being fully advised in the premises; and having filed his opinion granting motions for leave to file amended complaints; it is hereby

Ordered, adjudged, and decreed this 3rd day of June 1935 that the plaintiffs' motion for leave to amend be and the same hereby is granted, and plaintiffs are permitted to file the proposed amended complaint.

It is further ordered that the defendant be required to further plead within the time prescribed by the rules of the court.

JENNINGS BAILEY, *Justice.*

O. K. as to form:

J. KENNARD CHEADLE,
One of Attorneys for Defendant.

In Supreme Court of District of Columbia

Amended bill of complaint

Filed June 4, 1935

* * * * * * *

To the Supreme Court of the District of Columbia, holding an equity court:

The plaintiffs, by leave of the court first had and obtained, files herein their amended bill of complaint and respectfully represent:

That they are citizens of the United States and of the State of Washington, residing near Granger, in Yakima County, Washington, and that their post-office address is Granger, Washington, and
23 that they bring this suit in their own right and on their own behalf against Harold L. Ickes, a citizen of Illinois, residing in the District of Columbia, and they complain of the matters and things hereinafter set forth.

I

That the defendant is now and has been since, to wit: March 5th, 1933, the duly appointed, qualified, and acting Secretary of the Interior of the United States and as such has charge of the administration of the laws of the United States relating to irrigation and reclamation projects, constructed by the United States and particularly to the administration of the act of Congress, known as the Reclamation Act, being the act of June 17th, 1902 (32 Stat. 388), as amended and supplemented by later acts of Congress; but solely under and subject to the irrigation and appropriation laws of the State of Washington, and that said defendant is sued in his official capacity as such Secretary of the Interior as hereinafter set forth.

II

That prior to 1903, the then owners of the following-described land, to wit: Southeast quarter of the northeast quarter of section 16, township 10 north, range 21 E., W. M., acquired by purchase from the Washington Irrigation Company, the then owners of the Sunnyside Canal and water appropriations from the Yakima River, a water right for the following described land, to wit: Southeast quarter of the northeast quarter, section 16, township 10 north, range 21

E., W. M., that after said purchase there was actually furnished by said company and beneficially used upon said land the amount of water necessary to beneficially and successfully irrigate the same, that the amount so delivered was six acre-feet of water per acre per annum, that under the laws of the State of Washington, said water right became appurtenant to said land and is real estate.

III

That in 1906, the then Secretary of the Interior approved an irrigation and reclamation project known as the Sunnyside unit of the Yakima project and on behalf of the United States purchased from the Washington Irrigation Company the Sunnyside Canal, water appropriations, and irrigation system used in connection therewith.

IV

That shortly after the purchase by the Secretary of the Interior for the United States of said canal, water appropriations, and irrigation system; and, at the time, the construction of storage reservoirs were contemplated and considered by the then Secretary of the Interior, said Secretary offered to give the then owners of said land added security for a sufficient amount of water to beneficially and successfully irrigate said lands and other lands with a similar
24 water right if they would join in forming the Sunnyside Water Users' Association, a corporation under the laws of the State of Washington, and authorize the execution of a contract by said corporation with the United States, a copy of which contract is hereto attached, made a part hereof, marked "Exhibit A."

V

That the then Secretary of the Interior ascertained the total cost of sufficient storage reservoirs to store sufficient water to beneficially and successfully irrigate said land and other lands in the Sunnyside unit of the Yakima project and found the same to be $10.00 per acre, and that said sum would be sufficient to return to the reclamation fund the cost of storage reservoirs sufficient to furnish said amount of water to said land.

VI

That the then owners of the land herein described before they could receive the benefits of said storage were required to enter into a contract with the United States, known as an old supplemental water right contract; that pursuant thereto the then owners of the land herein described entered into contract with the United States to purchase such an additional water right, a copy of which said contract is hereto attached, made a part hereof, marked "Exhibit B."

VII

That the successive Secretaries of the Interior from and after the execution of said contract as herein alleged, their representatives and subordinates who were charged with and who actually administered said project, uniformly and at all times construed the Reclamation Act and said contract; that the owners of the land herein described and the owners of all other lands in said unit with similar contracts had purchased a sufficient amount of water to beneficially and successfully irrigate their said land; that the amount of water required for each tract to beneficially irrigate the same was to be determined by the representatives and subordinates of the Secretary of the Interior, who had the physical charge of water distribution from a factual investigation made by said representatives and subordinates by their going upon the land from time to time, from a personal examination of the same, the crops growing thereon, and the water requirements thereof. That pursuant to said practical construction made by the representatives and subordinates of the Secretary of the Interior, in the method and manner aforesaid, it was determined by the successive Secretaries of the Interior, their representatives, and their subordinates, that six acre-feet of water per acre per annum was necessary to beneficially and successfully irrigate said land; that pursuant to said practical construction and determination the successive Secretaries of Interior, their representatives and subordinates, have for a period of more than twenty years, delivered to said land the amount of water necessary to beneficially and successfully irrigate the same, which water has at all times been beneficially used thereon for irrigation purposes.

VIII

25

That the statute law of the State of Washington, Remington's Revised Statutes, section 7391, which was the law of the State of Washington at the time the water rights herein described were acquired, provides:

"The right to the use of water which has been applied to a beneficial use in the State shall be and remain appurtenant to the land or place upon which the same is used."

That the decisions of the Supreme Court of the State of Washington uniformly hold that where water is beneficially used upon land for irrigation purposes, the water right so obtained shall be and remain appurtenant to the land where the same is used, and the absolute title to the water right becomes vested in the owner of the land and that pursuant to said law the absolute title in fee simple to six acre-feet of water per acre per annum became and is now vested in the plaintiffs.

IX

That the United States completed the construction of the irrigation system in said unit and constructed reservoirs of sufficient capac-

ity to beneficially and successfully irrigate all lands within said unit; and that after all the costs of construction of said irrigation system and reservoirs of sufficient capacity to successfully and beneficially irrigate said land had been ascertained, and after the determination had been made that six acre-feet of water per acre per annum was necessary to beneficially and successfully irrigate said land, and after said water had been delivered for several years and beneficially used on said land, Congress passed an act providing that no increase of construction charges could be made after the same has been fixed except by agreement between the Secretary of the Interior and a majority of the water-right applicants; that thereafter and on September 24th, 1914, the then Secretary of the Interior, Franklin K. Lane, issued a public notice and order expressly providing that there would be no increase in the construction charges against the land herein described, a copy of said public notice is hereto attached, made a part hereof, and marked "Exhibit C."

X

That the plaintiffs and their predecessors in title have fully and in every particular complied with the terms of the Reclamation Act and said contract, a copy of which is marked "Exhibit B" and have fully paid to the United States the sum of $10.00 per acre in full payment for said supplemental water right for said land and have also paid all operation and maintenance charges assessed against the same, and these plaintiffs are now the holder and owner of the fee simple title to said water right, sufficient to beneficially and successfully irrigate said land, to wit: Six acre-feet of water per acre per annum; that said water right is appurtenant to the land herein described and the absolute fee simple title to said land and water right is now vested in the plaintiffs.

26

XI

That on or about the year 1930, Elwood Mead, Commissioner of Reclamation of the United States, wanted to construct the Cle Elum Reservoirs at a cost of $3,500,000.00 to store water for the purpose of irrigating lands in the Kittitas reclamation district, the canal and distribution system in said district being in the process of construction at that time, and also for the purpose of furnishing water to irrigate lands in the Roza and Kennewick divisions of the Yakima project, the construction of which was contemplated at that time; that said Mead ascertained the total cost of said reservoir was $1,000,000.00 more than the amount that would be returned to the reclamation fund from said divisions; that it was necessary to obtain said sum from some other source before the construction of the Cle Elum Reservoir could be commenced; that said Mead needed said storage reservoir in particular to store water for the Kittitas reclamation district; that he knew of no other source from which to obtain said sum except from the Sunnyside unit of the Yakima project; that

said Mead, without consulting these plaintiffs or other water users in said unit and said district, charged the sum of $1,000,000.00 to said unit and district, and furnished the Secretary of Interior information that provision had been made for the payment by said unit of said sum.

XII

That thereafter B. E. Stoutemyer, district counsel, and other officials of the Bureau of Reclamation of the United States attempted to persuade the plaintiffs and other water-right users under similar contracts in the Sunnyside unit and in the Sunnyside Valley Irrigation District to authorize the officials of the district to execute a contract with the United States agreeing to pay $1,000,000.00 additional construction charge and obligating the plaintiffs' land and all other lands in said district to the last faithful acre to pay said sum; that this plaintiff and all other owners of old supplemental water rights in said unit and district refused to so obligate their said land; that the amount so attempted to be charged against the plaintiffs and other water users in said district was equivalent to 35% of the original cost of the water right to their said land.

XII

That on or about the 11th day of December 1930, Ray Lyman Wilbur, the then Secretary of the Interior, certified to the President of the United States that provision had been made for the repayment to the reclamation fund of the total cost of the Cle Elum Reservoir and that $1,000,000.00 of the cost of construction of said reservoir was to be obtained by rentals from the Sunnyside division of the Yakima project. A copy of this certificate is hereto attached, made a part hereof, marked "Exhibit D."

27

XIV

That thereafter said Elwood Mead, and B. E. Stoutemyer, conspired with Ray Lyman Wilbur, the then Secretary of the Interior, to force and coerce these plaintiffs and other water users under similar contracts in said unit and district to authorize said district to enter into contract to pay the additional sum of $1,000,000.00 construction charge and/or to force and coerce the plaintiffs and other water users in said unit and in said district, including these plaintiffs, to sign a water-rental application or be deprived of a portion of the water owned by them; that in pursuance of said agreement said Mead, Stoutemyer, and Wilbur, caused the Assistant Secretary of the Interior to issue a public notice and order, a copy of which is hereto attached, made a part hereof, marked "Exhibit E" and also a public notice and order, a copy of which is hereto attached, made a part hereof, marked "Exhibit F."

XV

That in pursuance of said agreement and said public notices and orders, copies of which are marked "Exhibits E and F", and public orders and notices made pursuant thereto said Mead, Stoutemyer, and Wilbur, notified these plaintiffs and other owners of what is known as old supplemental water rights in the Sunnyside unit and in said district that they would be deprived of the use of all water in excess of a certain fixed amount and that the plaintiffs would be deprived of all water in excess of three and one-half acre-feet of water per acre per annum, unless the plaintiffs signed a water-rental application, in the words and figures following, to wit:

"WATER-RENTAL APPLICATION

"The undersigned applicant requests excess water under public notice issued by the Secretary February 19, 1932, and agrees to pay application charges, with 6% interest from December 1, 1932, until paid. He further agrees that water may be withheld from his land after 1932 until such charges are paid. It is understood that advance payment for excess water will be required in 1933 if the 1932 rental charge remains unpaid at that time.

"Witness ——— "———— ————,

"*Water user.*"

That the plaintiffs and other owners of old supplemental water rights refused to sign said water-rental application. That in the event said public notices and orders are enforced, plaintiffs will be deprived of the use and enjoyment of about 40% of their said water right, the absolute title to which water right is now and has been for more than thirty years last past vested in the plaintiffs and their predecessors in title to said premises.

28

XVI

That said Stoutemyer, Mead, and Wilbur agreed together and made an arrangement with the representatives of other divisions of the Yakima project which were under construction and to be constructed as follows: The said Stoutemyer, Mead, and Wilbur would attempt by means of said water-rental applications to force and coerce these plaintiffs and other water users in said unit and district to authorize the officials of the Sunnyside Valley Irrigation District to execute a contract agreeing to pay to the United States the additional sum of $1,000,000.00 construction charges, the same being a portion of the cost of constructing a portion of the Cle Elum Reservoirs and which was constructed for said division and/or to collect from the plaintiffs and other water users in said unit by the subterfuge of the water-rental applications, said sum of $1,000,000 00 and that in the event said parties were unable to either force or coerce the execution of such a contract between said district and the United States and/or

were unable to collect said sum of $1,000,000.00 by depriving the plaintiffs and other water users of a portion of the water owned by them, and/or compelling the plaintiffs and said water users to sign said water-rental application and collect said sum; and in the event said parties were unable by either of said methods to obtain the payment of said sum of $1,000,000.00, said new divisions for whose benefit said Cle Elum Reservoir was constructed would pay the same.

XVII

That three and one-half acre-feet of water per acre is not now, never has been, and will not in the future, be sufficient to beneficially irrigate the land belonging to the plaintiffs; that a maximum of three and one-half acre-feet of water per acre furnished to the land of the plaintiffs would enable them to beneficially irrigate about one-half of said land, leaving the other half thereof barren and nonproductive, thereby forcing one-half of the land belonging to the plaintiffs to bear construction, maintenance charges, taxes, and assessments on the whole tract of land; that if plaintiffs attempt to spread a maximum of three and one-half acre-feet per acre over the whole tract of land belonging to them they would not have sufficient water to grow any profitable crop and their land would be completely destroyed for farming purposes, causing them to suffer irreparable loss and damage and which could not be compensated for in an action at law and plaintiffs have no adequate or complete remedy at law and effective relief can only be administered in a court of equity.

XVIII

That at all times and on all other Federal reclamation projects and on the Sunnyside unit of the Yakima project prior to October 17th, 1930, which were constructed under the Reclamation Act of 1902, the successive Secretaries of Interior, their subordinates, and their representatives charged with the administration of said
29 project have consistently and uniformly construed the Reclamation Act, contracts similar to exhibit A, and water-right contracts similar to exhibit B to mean that the water-right applicant and water user had purchased, had a vested interest prior to full payment, and that the owner of the absolute title in fee simple after full payment of the purchase price for a water right of a sufficient amount of water to beneficially and successfully irrigate each tract of land in said project and that the determination as to the amount required to beneficially and successfully irrigate each tract was to be made by the representatives and subordinates of the successive Secretaries of the Interior who were charged with the distribution and that the same was to be made by said representatives and subordinates upon factual investigation obtained by personal examination of the land and crops growing thereon and water requirements thereof; and in all cases the yardstick used in determining the amount of water to

which the water applicant either had a vested interest in or owned was beneficial use. That in the administration of the Reclamation Act under contracts similar to the contract herein referred to no Secretary of the Interior has arbitrarily fixed the amount of water at a certain number of feet, nor taken the question of the determination of the amount of water out of the hands of his representatives and subordinates charged with the physical distribution of the water, nor fixed the maximum amount of water for each acre in the project, regardless of the water requirements, nor required the execution of a water rental application as a condition precedent to the use and enjoyment by the water user of a sufficient amount of water to beneficially irrigate his land, except as herein alleged in the Sunnyside unit.

XIX

That since the promulgation of said order and notice of October 17th, 1930, and the public notice order of February 19th, 1932, and since the promulgation of order requiring a water-rental application as a condition precedent to the use and enjoyment of more than three acre-feet of water per acre per annum, it has been definitely ascertained by the defendant that the Cle Ulum Reservoir actually cost $1,003,000.00 less than the estimated cost at the time said Mead charged the sum of $1,000,000.00 to the Sunnyside unit as herein alleged; that since that time the Kittitas reclamation district has entered into contract to purchase from the United States additional water at a total contract price of $2,418,000.00 and the Yakima-Benton Irrigation District, Roza unit, has authorized a contract to be entered into at an additional cost over and above what was taken into consideration at the time of the certificate by the Secretary of the Interior to the President as set forth in plaintiff's exhibit D. That on account of said facts there is no necessity for enforcing said orders, and in the event the same are enforced and the Sunnyside Valley Irrigation District or the plaintiff and other water users therein pay said sum of $1,000,000.00 the United States will actually receive more than $1,000,000.00 over the entire cost of the construction of said reservoir.

30

XX

That the public notices, copies of which are hereto attached, marked "Exhibits E and F" issued by Ray Lyman Wilbur as Secretary of the Interior on October 17th, 1930, and February 19th, 1932, respectively, requiring the execution by the water user of a water-rental application as a condition precedent to the enjoyment and use by the plaintiff of any water in excess of three and one-half acre-feet, were not made and issued in good faith or by the exercise of an honest judgment for the reasons herein alleged and set forth, but were arbitrarily and capriciously made and the defendant is arbitrarily and

capriciously enforcing the same for the express purpose of coercing and forcing this plaintiff and other water-right applicants and water users in said unit and in said district to authorize said district to enter into contract to pay the United States the sum of $1,000,000.00 construction charge, a part of the cost of constructing the Cle Elum Reservoir, and obligating the last faithful acre of land in said district and the plaintiff's land to pay said sum and/or to force and coerce the plaintiffs and other water-right applicants and water users in said unit and district to execute water-rental applications so that this plaintiff and said water-right applicants and water users will be required to pay to the United States said sum of $1,000,000.00.

XXI

That for the reasons herein alleged and set forth said public notice and order of October 17th, 1930, and said public notice and order of February 19th, 1932, copies of which are hereto attached marked "Exhibits F and G", and all orders and notices requiring the execution of a water-rental application as a condition precedent to use and enjoyment of more than three and one-half acre-feet per acre per annual are null and void and of no effect whatsoever for the reason that the same are in excess of the power and authority vested in the Secretary of the Interior and the enforcement of said public notice and orders are in excess of the authority vested in the defendant; that if said defendant enforces said public notices and orders the plaintiff will be deprived of the use of about 40% of the water right, the absolute title to which is vested in plaintiff pursuant to the terms of the Reclamation Act, contracts, and laws of the State of Washington, without any hearing, and in positive violation of the Constitution and laws of the United States and also in positive violation of the Constitution and laws of the State of Washington.

XXII

That the defendant started the enforcement of said public notice and order of October 17th, and February 19th, 1932, and the orders requiring a water-rental application to be signed as a condition precedent to the use and enjoyment by the plaintiff in excess of three and one-half acre-feet, during the irrigation season of 1934,
31 and the plaintiff is advised and believes and therefore alleges that said defendant, unless he is restrained by an order of this court, will enforce said orders and public notices during the present irrigation season, that said defendant has refused to give any heed to a joint memorial of the State Legislature of the State of Washington in connection with said public notices and orders and has also refused plaintiff and other water-right applicants and water users a right to be heard and said defendant has wholly refused to consider plaintiff's ownership of said water right and takes the position that there is nothing that the plaintiff can do and that said defendant

can arbitrarily and capriciously enforce said public notices and orders and thus compel submission of said water-right applicants and the other water users in said unit and district and collect the sum of $1,000,000.00 to pay a part of the cost of the construction of the Cle Elum Reservoir; that there is no other forum or court that has jurisdiction to give this plaintiff any relief against the unlawful acts of said defendants, and if defendant is permitted to enforce said notices and orders the plaintiff's farm will be destroyed for farming purposes and the plaintiff will be driven therefrom and will lose the savings of an entire lifetime.

Wherefore, the plaintiff prays:

1. That the defendant, Harold L. Ickes, Secretary of the Interior, be required to appear and make answer to the foregoing amended bill of complaint, but not under oath, answer under oath being hereby expressly waived.

2. That upon the filing of this amended bill or at such time thereafter as shall be fixed by the court, an order be issued herein pendente lite requiring the defendant as Secretary of the Interior to suspend the enforcement of the public notice and order, a copy of which is hereto attached marked "Exhibit E", and to suspend the enforcement of the public notice and order, a copy of which is hereto attached, marked "Exhibit F", promulgated by his predecessor, Ray Lyman Wilbur, and also all notices and orders requiring the execution of a water-rental application as a condition precedent to enjoying the use of more than three and one-half acre-feet of water per acre per annum, and restoring to the plaintiff his rights and privileges that he enjoyed prior to the promulgation of said notices and orders, and that upon the hearing of this action an order be entered requiring the defendant as Secretary of the Interior to vacate, set aside, and hold for naught the said notices and orders herein referred to and that the plaintiff be restored to the rights and privileges which he enjoyed prior to the promulgation of said notices and orders.

3. For such other and further relief as shall be just and equitable in the premises.

PRESTON B. KAVANAGH,
Attorney for Plaintiffs.
STEPHEN E. CHAFFEE,
P. C. KING, Jr.,
Attorneys for Plaintiffs.

32 [*Duly sworn to by Philip L. Parks; jurat omitted in printing.*]

Memoranda

Exhibit A attached hereto is the same as that attached to bill of complaint for injunction, at page 18 of this record.

Exhibit B attached hereto is the same as that attached to bill of complaint for injunction, at page 22 of this record.

Exhibit C to amended complaint

GENERAL PUBLIC NOTICE FOR ALL RECLAMATION PROJECTS

DEPARTMENT OF THE INTERIOR,
Washington, September 24, 1914.

1. In pursuance of the provisions of the Reclamation Extension Act of August 13, 1941 (Public, No. 170), notice is hereby given that the charges for a water right for lands under the several projects and units thereof for which public notice or notices have heretofore issued are of two kinds: (1) A charge per irrigable acre for the building of the irrigation system termed as construction charge; (2) an annual charge for each acre-foot of water delivered, payable at such time as may hereafter be fixed, for the operation and maintenance of the project or a unit thereof. Each acre of irrigable land, whether irrigated or not, will be charged with a minimum operation and maintenance charge based upon the charges for delivery of not less than one acre-foot of water.

2. The amount of the construction charge per irrigable acre for lands for which entry under the provisions of the Reclamation Act of June 17, 1902 (32 Stat. 388), or water-right application has heretofore been made, shall be the amount fixed in the several public notices heretofore issued for the respective lands and therein termed "the building charge", and will not be increased, except as provided in said Reclamation Extension Act.

3. Any person whose land or entry has heretofore become subject to the terms and conditions of the reclamation law, may secure the benefits of the extension of the period of payments, provided for in the said Reclamation Extension Act, by notifying the Secretary of the Interior of his acceptance of all the terms and conditions of said act. Such notice of acceptance shall be in the form prescribed by the Secretary, and may be obtained from the project manager on application. Such acceptance must be filed with the project
33 manager within six (6) months from the date of this public notice. The construction charge, for the lands or entries of persons so accepting the benefits of the period of extension, or so much thereof as may remain unpaid at the time of the filing said notice of acceptance, must be paid in not more than twenty (20) annual instalments; the first of which instalments will be due December 1, 1914, and the subsequent instalments due December 1 of each year thereafter. The first four of such annual instalments shall be each two (2) per centum and the next two instalments each four (4) per centum, and the remaining fourteen instalments each six (6) per centum of the said construction charge, or of the portion thereof remaining unpaid at the time of filing said notice of acceptance as the case may be. The whole or any part of the construction charge may be paid within any shorter period than 20 years if so desired.

4. The method of determining the annual operation and maintenance charge, the penalties for failure to pay the construction

charges and the operation and maintenance charges when due, the reclamation requirements, and the discount allowed for prepayment of the operation and maintenance charges are prescribed by the said Reclamation Extension Act.

FRANKLIN K. LANE,
Secretary of the Interior.

Exhibit D to amended complaint

DECEMBER 11, 1930.

MY DEAR MR. PRESIDENT: The acts of Congress of March 7, 1928, 45 Stat. 200, 228, and of March 4, 1929, 45 Stat. 1562, 1592, make appropriations of $500,000 and $1,000,000, respectively, for the construction of Cle Elum Dam, Yakima project. By act of May 14, 1930, 16 Stat. 279, 308, the unexpended balances of these appropriations were made available during the fiscal year 1931.

Section 4 of the act of June 25, 1910, provides in effect that after the date of that act no irrigation project to be constructed under the act of June 17, 1902, 32 Stat. 388, and amendatory acts shall be undertaken until the project shall have been recommended by the Secretary of the Interior and approved by the direct order of the President.

Subsection B, section 4 of the act of December 5, 1924 (43 Stat. 702), provides as follows:

"That no new project or new division of a project shall be approved for construction or estimates submitted therefor by the Secretary until information in detail shall be secured by him concerning the water supply, the engineering features, the cost of construction, land prices, and the probable cost of development, and he shall have made a finding in writing that it is feasible, that it is adaptable for actual settlement and farm homes, and that it will probably return the cost thereof to the United States."

As the sixth and last of a series of dams for regulating and storing the waters of the Yakima River and tributaries, it is proposed to construct an earth- and gravel-fill storage dam located on the Cle Elum River, a tributary of the Yakima River. This dam is to have a maximum height of about 125 feet, a crest length of 700 feet, and a volume of about 450,000 cubic yards of material, forming
34 a reservoir with an area of 4,680 acres for storage of 435,000 acre-feet of water for the irrigation of lands under the Yakima project. The cost of the storage dam is estimated at $2,800,000; of the reservoir right-of-way, $300,000; and of flowage rights and contingencies, $400,000; making the total estimated cost $3,500,000. This constitutes a part of the storage system of the project, the total actual and estimated cost of which is $11,558,000. Of this amount, the return of $6,996,000 is guaranteed under existing contracts, leaving a balance of $4,562,000, the repayment of which will be provided for as follows: Five hundred eighty thousand dollars is to be repaid by the Wapato Indian Reservation, $1,000,000 by rentals from the

Sunnyside division of the Yakima project, and the remainder by the Roza and Kennewick divisions of the project.

The development is believed to be feasible, the project is adaptable for actual settlement and farm homes, and the cost of construction of the dam will, in all probability, be returned to the United States.

It is recommended that this work be approved, and that the necessary authority be issued to this Department to make contracts for the construction of the dam and to proceed with the work.

Very truly yours,

(Signed) RAY LYMAN WILBUR.

Exhibit E to amended complaint

OCTOBER 17, 1930.

NOTICE AND RULES AND REGULATIONS AS TO WATER DELIVERIES IN THE SUNNYSIDE VALLEY IRRIGATION DISTRICT FOR THE YEAR 1921 AND SUBSEQUENT YEARS AND DETERMINATION OF AMOUNT OF WATER REQUIRED

The water applications and water right contracts which determine the limit of the individual water rights in the Sunnyside Valley Irrigation District provide in most cases—

(A) For the delivery of three (3) acre-feet of water or so much thereof as is necessary for beneficial use in years of ordinary run-off in Yakima River, with a provision for a pro rata reduction in years of unusual drought or low water.

(B) Some of such applications or contracts provided for delivery of 3 acre-feet subject to a proviso "that the amount of water furnished shall be limited to the amount beneficially used upon said lands."

(C) Still other applications or contracts provide for delivery of 3 acre-feet per annum per acre, "or as much more water as will be required to successfully irrigate the land, the amount so required to be determined by the authorized agent of the United States" and subject to the proviso "that the amount of water furnished shall be limited to the amount beneficially used upon such lands" and the further provision "that the United States shall not be responsible for the failure to supply water under this contract caused by insufficient supply of water in Yakima River due to hostile diversion or unusual drought."

35 The amount of water required to grow a successful crop depends largely upon the amount of labor and money expended in preparing the land, providing equipment for economical use of water, and caring for the water to avoid waste. Cheap storage sites are available on the Yakima River, particularly at Lake Cle Elum, and it may be cheaper to provide additional storage than to provide the necessary labor and equipment to secure an economical use of water. If the purchase of additional storage is preferred to strict

economy in the use of the existing water supply, the opportunity is availbale to provide additional storage by participation in the construction of another reservoir.

Owing to the fact that the canal system of the Kittitas division of the Yakima project has not heretofore been completed and the lands of that division have not heretofore been ready to use the stored water to which they are entitled, it has been possible to allow the water users of the Sunnyside Valley Irrigation District the temporary use of water in excess of the amounts specified in their respective contracts and water applications, but the Kittitas division is now beginning the use of the water to which it is entitled under the contract between the Kittitas Reclamation District and the United States and it has now become necessary to limit water deliveries in the Sunnyside Valley Irrigation District to the amounts specified in the contracts and water applications applicable to the lands in that district.

In order that all water users in the Sunnyside Valley Irrigation District may know in advance that economy in the use of water will hereafter be necessary, and be prepared to take care of the water and use it to the best advantage, notice is hereby given that as to all lands except those above referred to in paragraph (C), during the year 1931 and subsequent years, until further notice, water deliveries in that district will be limited to three (3) acre-feet per irrigable acre per year, as specified in the said contracts and applications, except in years of unusual drought or low water when it will be necessary to limit deliveries to a somewhat smaller amount as provided for in said contracts applicable to the lands of the district; provided, however, that so long as there is surplus stored water available not required to meet the contract obligations of the United States to other parties, water in excess of three acre-feet may be rented by water users of the Sunnyside Valley Irrigation District of the classes referred to above as "A" and "B" whose rights are limited under their applications and contracts to 3 acre-feet. The water rental charge for such extra water in excess of 3 acre-feet used during the irrigation season of 1931 will be one dollar and fifty cents ($1.50) per acre-foot, and the rental rate will be announced annually for subsequent seasons. All money collected for the rental of such extra water will be applied toward the payment of the unsecured portion of the construction costs of the reservoir system of the Yakima project.

The determination "by the authorized agent of the United States" of the amount of water required "to successfully irrigate" the lands subject to the above-quoted clause referred to in paragraph C will be made during the year 1931 and deliveries to such lands in
36 1932 and subsequent years will be governed by such determination, except in years of unusual drought or low water when it will be necessary to limit deliveries to a somewhat smaller amount, as provided for in said contracts applicable to such lands.

(Signed) JOHN H. EDWARDS,
Assistant Secretary of the Interior.

Exhibit F to amended complaint

UNITED STATES DEPARTMENT OF THE INTERIOR, BUREAU OF RECLAMATION

Sunnyside Division, Yakima Project, Washington—Notice of Water Duty Determination

WASHINGTON, D. C., *May 5, 1932.*

Whereas pursuant to the provisions of the public notice of October 17, 1930, reading in part as follows:

"The determination 'by the authorized agent of the United States' of the amount of water required 'to successfully irrigate' the lands subject to the above-quoted clause referred to in paragraph C will be made during the year 1931 and deliveries to such lands in 1932 and subsequent years will be governed by such determination, except in years of unusual drought or low water, when it will be necessary to limit deliveries to a somewhat smaller amount as provided for in said contracts applicable to such lands",

the lands designated under paragraph C of said public notice have been classified and a determination made of the quantity of water required to successfully irrigate the several classes of lands under said paragraph C of said public notice by the undersigned as the authorized agent of the United States for such purposes, as provided in the terms of the several water-right applications and contracts governing the use of water upon said lands:

Now, therefore, notice is hereby given of such classification and determination as follows:

For old supplemental lands classified in the W. W. Johnston report of February 1932 as—

Class No. 1—3 acre-feet per acre.
Class No. 2—3 acre-feet per acre.
Class No. 3—3.5 acre-feet per acre.
Class No. 4—4 acre-feet per acre.
Class No. 5—5 acre-feet per acre.

pursuant to the said classification, the project superintendent is authorized to send to the owners of said lands notices in the following form:

"Pursuant to notice issued by the Secretary of the Interior dated May 5, 1932, notice is given that the tract of land shown by the water users' records under serial no. ------ as having an irrigable area of ------ acres and as in the ownership name of ------
37 has been determined to belong in class no. ------ and that except in years of unusual drought or low water, when water deliveries to said lands may be limited to less than the quantities herein designated, the amount indicated for that class will constitute the required water deliveries to said land.

"Notice is further given that beginning with the irrigation season of 1932, and until further notice, water deliveries to or for the said ------ acres under said serial no. ------ in excess of the above-determined quantity per acre, will be subject to water-rental charges at rates established in public notice for the irrigation season of 1932 and in subsequent public notices."

(Sgd.) Jos. M. Dixon,
First Assistant Secretary of the Interior.

In Supreme Court of District of Columbia

Motion to dismiss

Filed June 7, 1935

* * * * * * *

Comes now Harold L. Ickes, Secretary of the Interior, the defendant in the above-entitled cause, and moves to dismiss the above-entitled cause and the plaintiffs' amended bill of complaint in said cause upon each and every of the following grounds:

1. That the defendant has no individual interest in the controversy, and the relief sought against him is in his official capacity only, as a representative of the Government, which alone is to be affected by any decree herein, wherefore this suit, as manifest upon the face of the amended bill of complaint, is essentially and substantially a suit against the United States, beyond the jurisdiction of the court.

2. That the amended bill of complaint and the exhibits attached thereto and made a part thereof show that this suit is brought on contracts to which the United States is a party and that the decree prayed for would affect the interest of the United States in said contracts and the property of the United States, whereof the court is without jurisdiction.

3. That it is manifest, upon the face of the amended bill of complaint, that the plaintiffs seek, in substance and effect, a decree for specific performance by the United States of alleged obligations under its contracts whereof the court is without jurisdiction.

4. That it appears by the amended bill of complaint that the plaintiffs have a plain, adequate, and complete remedy at law, if they have any right.

5. That it is manifest, upon the face of the amended bill of complaint, that the relief prayed for therein would necessarily involve continued and detailed supervision by this court, for a long and indefinite period, of the performance of contract duties that require the exercise of personal judgment and technical skill, wherefore said bill lacks equity.

Exhibit F to amended complaint

UNITED STATES DEPARTMENT OF THE INTERIOR, BUREAU OF RECLAMATION

Sunnyside Division, Yakima Project, Washington—Notice of Water Duty Determination

WASHINGTON, D. C., *May 5, 1932.*

Whereas pursuant to the provisions of the public notice of October 17, 1930, reading in part as follows:

"The determination 'by the authorized agent of the United States' of the amount of water required 'to successfully irrigate' the lands subject to the above-quoted clause referred to in paragraph C will be made during the year 1931 and deliveries to such lands in 1932 and subsequent years will be governed by such determination, except in years of unusual drought or low water, when it will be necessary to limit deliveries to a somewhat smaller amount as provided for in said contracts applicable to such lands",

the lands designated under paragraph C of said public notice have been classified and a determination made of the quantity of water required to successfully irrigate the several classes of lands under said paragraph C of said public notice by the undersigned as the authorized agent of the United States for such purposes, as provided in the terms of the several water-right applications and contracts governing the use of water upon said lands:

Now, therefore, notice is hereby given of such classification and determination as follows:

For old supplemental lands classified in the W. W. Johnston report of February 1932 as—

Class No. 1—3 acre-feet per acre.
Class No. 2—3 acre-feet per acre.
Class No. 3—3.5 acre-feet per acre.
Class No. 4—4 acre-feet per acre.
Class No. 5—5 acre-feet per acre.

pursuant to the said classification, the project superintendent is authorized to send to the owners of said lands notices in the following form:

"Pursuant to notice issued by the Secretary of the Interior dated May 5, 1932, notice is given that the tract of land shown by the water users' records under serial no. ------ as having an irrigable area of ------ acres and as in the ownership name of ------
37 has been determined to belong in class no. ------ and that except in years of unusual drought or low water, when water deliveries to said lands may be limited to less than the quantities herein designated, the amount indicated for that class will constitute the required water deliveries to said land.

"Notice is further given that beginning with the irrigation season of 1932, and until further notice, water deliveries to or for the said ------ acres under said serial no. ------ in excess of the above-determined quantity per acre, will be subject to water-rental charges at rates established in public notice for the irrigation season of 1932 and in subsequent public notices."

(Sgd.) Jos. M. Dixon,
First Assistant Secretary of the Interior.

In Supreme Court of District of Columbia

Motion to dismiss

Filed June 7, 1935

* * * * * * *

Comes now Harold L. Ickes, Secretary of the Interior, the defendant in the above-entitled cause, and moves to dismiss the above-entitled cause and the plaintiffs' amended bill of complaint in said cause upon each and every of the following grounds:

1. That the defendant has no individual interest in the controversy, and the relief sought against him is in his official capacity only, as a representative of the Government, which alone is to be affected by any decree herein, wherefore this suit, as manifest upon the face of the amended bill of complaint, is essentially and substantially a suit against the United States, beyond the jurisdiction of the court.

2. That the amended bill of complaint and the exhibits attached thereto and made a part thereof show that this suit is brought on contracts to which the United States is a party and that the decree prayed for would affect the interest of the United States in said contracts and the property of the United States, whereof the court is without jurisdiction.

3. That it is manifest, upon the face of the amended bill of complaint, that the plaintiffs seek, in substance and effect, a decree for specific performance by the United States of alleged obligations under its contracts whereof the court is without jurisdiction.

4. That it appears by the amended bill of complaint that the plaintiffs have a plain, adequate, and complete remedy at law, if they have any right.

5. That it is manifest, upon the face of the amended bill of complaint, that the relief prayed for therein would necessarily involve continued and detailed supervision by this court, for a long and indefinite period, of the performance of contract duties that require the exercise of personal judgment and technical skill, wherefore said bill lacks equity.

Wherefore, the defendant, Harold L. Ickes, Secretary of the Interior, prays that the above-entitled cause be dismissed, that the amended bill of complaint in said cause be dismissed, and that
38 he be permitted to go hence without day, be for nothing held, and recover of the plaintiffs his costs.

NATHAN R. MARGOLD,
Solicitor, Department of the Interior.
J. KENNARD CHEADLE,
Assistant Solicitor, Department of the Interior,
HOWARD R. STINSON,
Assistant Solicitor, Department of the Interior,
Attorneys for defendant.

Service accepted and copy received June 7th, 1935.

STEPHEN E. CHAFFEE,
One of Atty: for Plff.

In Supreme Court of District of Columbia

Memorandum opinion

Filed June 14, 1935

* * * * * * *

In sustaining the motions in these cases for leave to file the amended bills accompanying the motions I necessarily considered the questions raised by the motions to dismiss.

My opinion has not been changed by the argument and briefs in behalf of the motions, and the motions to dismiss will be overruled, with leave to the defendant to answer within thirty days.

BAILEY, *J.*

In Supreme Court of District of Columbia

Order denying motion to dismiss amended bill of complaint

Filed June 24, 1935

* * * * * * *

The above-entitled cause coming on to be further heard on defendant's motion to dismiss the amended bill of complaint herein and the parties thereto having appeared in open court by their respective attorneys and the arguments of said attorneys on said motion having been heard, the matter having been submitted, and the court being fully advised in the premises, and having denied said motion to dismiss; it is hereby

Ordered, adjudged, and decreed this 24th day of June 1935 that the defendant's motion to dismiss plaintiffs' amended bill of complaint be and the same is hereby denied, with leave to the defendant to answer within thirty days.

JENNINGS BAILEY, *Justice.*

From the foregoing order the defendant, by his attorney of record in open court, notes a petition to the United States Court of Appeals for the District of Columbia for the allowance of a special appeal; whereupon it is hereby further ordered that further proceedings in this cause be stayed pending disposition of the
39 aforesaid petition for a special appeal, and if said petition be granted then pending disposition of the special appeal. If said petition or said special appeal be finally decided adversely to the defendant herein, the defendant shall have leave to answer within thirty days from such final decision.

JENNINGS BAILEY, *Justice.*

Acceptable as to form: No objection.
PRESTON B. KAVANAGH,
One of Attorneys for Plaintiffs.

In United States Court of Appeals for the District of Columbia

[Title omitted.]

Order allowing special appeal

Filed July 23, 1935

On consideration of the petition for the allowance of a special appeal in the above-entitled cause from the order of the Supreme Court of the District of Columbia entered therein on June 24, 1935, by Mr. Justice Jennings Bailey.

It is ordered by the court that the petition be and it is hereby granted and a special appeal allowed as prayed.

Per Mr. Chief Justice MARTIN.

JULY 22, 1935.
A true copy.
Test:
[SEAL]

HENRY W. HODGES, *Clerk.*
By MONCURE BURKE, *Deputy Clerk.*

In Supreme Court of District of Columbia

Assignment of errors

Filed July 26, 1935

* * * * * * *

Now comes the defendant, Harold L. Ickes, Secretary of the Interior, by his attorneys, and assigns as errors of the Supreme Court of the District of Columbia in the above-entitled cause the following:

1. The court erred in denying defendant's motion to dismiss the amended bill of complaint.
2. The court erred in signing and entering the order denying the motion to dismiss the amended bill of complaint.

40 3. The court erred in holding that the suit of plaintiffs was not brought against the United States.

4. The court erred in not granting the motion to dismiss the amended bill of complaint and in not dismissing the amended bill of complaint for lack of jurisdiction.

5. The court erred in not holding that the defendant has no individual interest in the controversy and that the relief sought against him is in his official capacity only, as an officer of the United States, which alone is to be affected by any decree herein, wherefore the suit, as manifest upon the face of the amended bill of complaint, is essentially and substantially a suit against the United States, beyond the jurisdiction of the court.

6. The court erred in not holding that the amended bill of complaint and the exhibits attached thereto and made a part thereof show that the suit is brought on contracts to which the United States is a party and that the decree prayed for would affect the interests of the United States in said contracts and the property of the United States, wherefore the court is without jurisdiction.

7. The court erred in not holding that the amended bill of complaint prays, in substance and effect, for a decree for specific performance by the United States of alleged obligations under its contracts, whereof the court is without jurisdiction.

8. The court erred in not holding that it appears by the amended bill of complaint that the plaintiffs have a plain, adequate, and complete remedy at law, if they have any right.

9. The court erred in not holding that the relief prayed for in the amended bill of complaint would necessarily involve continued and detailed supervision by this court, for a long and indefinite period, of the performance of contract duties that require the exercise of personal judgment and technical skill, wherefore said bill lacks equity.

NATHAN R. MARGOLD,
Solicitor, Department of the Interior,
FREDERICK BERNAYS WIENER,
Assistant Solicitor, Department of the Interior,
JACKSON E. PRICE,
Assistant Solicitor, Department of the Interior,
Attorneys for the Defendant.

Service of a copy of the above assignment of errors acknowledged this 26th day of July 1935.

PRESTON B. KAVANAGH,
One of the Attorneys for the Plaintiffs.

Memorandum

August 13, 1935

Time to file transcript of record in Court of Appeals extended to September 16, 1935.

41 In Supreme Court of District of Columbia

Designation of record

Filed July 26, 1935

* * * * * * *

The court will please prepare a transcript of the record in the above-entitled cause and include therein the following:

1. Bill of complaint.
2. Order of the court permitting amendment to the bill of complaint.
3. Amendment to bill of complaint.
4. Motion to dismiss bill of complaint, as amended.
5. Memorandum opinion of Mr. Justice Bailey granting motion to dismiss bill of complaint, as amended.
6. Order of the court granting motion to dismiss and dismissing bill of complaint, as amended.
7. Motion for leave to amend.
8. Memorandum opinion of Mr. Justice Bailey granting motion for leave to amend.
9. Order granting motion for leave to amend and permitting plaintiffs to file proposed amended bill of complaint.
10. Amended bill of complaint.
11. Motion to dismiss amended bill of complaint.
12. Memorandum opinion of Mr. Justice Bailey overruling motion to dismiss amended bill of complaint.
13. Order denying motion to dismiss amended bill of complaint.
14. Order showing allowance of special appeal by Court of Appeals.
15. Assignment of errors.
16. This designation.

NATHAN R. MARGOLD,
Solicitor, Department of the Interior,
FREDERICK BERNAYS WIENER,
Assistant Solicitor, Department of the Interior,
JACKSON E. PRICE,
Assistant Solicitor, Department of the Interior,
Attorneys for the Defendant.

Service of a copy of the above designation of record acknowledged this 26th day of July 1935.

PRESTON B. KAVANAGH,
One of the Attorneys for the Plaintiffs.

42 [Clerk's Certificate to foregoing transcript omitted in printing.]

43 In United States Court of Appeals

[Title omitted.]

Minute entry

January 7, 1936

The argument in the above entitled causes was commenced by Mr. F. B. Wiener, attorney for appellant, and was continued by Mr. Stephen E. Chaffee, attorney for appellees, and was concluded by Mr. F. B. Wiener, attorney for appellant.

44 In United States Court of Appeals for the District of Columbia

No. 6541

HAROLD L. ICKES, SECRETARY OF THE INTERIOR, APPELLANT

v.

MAZINE Z. FOX AND JOSIE R. FOX, HIS WIFE, APPELLEES

No. 6542

HAROLD L. ICKES, SECRETARY OF THE INTERIOR, APPELLANT

v.

PHILIP LOUIS PARKS AND OLLIE D. PARKS, HIS WIFE, APPELLEES

No. 6543

HAROLD L. ICKES, SECRETARY OF THE INTERIOR, APPELLANT

v.

JACOB F. OTTMULLER, APPELLEE

Appeal from the Supreme Court of the District of Columbia

Decided June 8, 1936

Nathan R. Margold, Frederick Bernays Wiener, Jackson E. Price, of Washington, D. C., for Appellants.

Preston B. Kavanagh, P. C. King, Jr., of Washington, D. C., and Stephen E. Chaffee, of Sunnyside, Washington, for Appellees.

Before MARTIN, Chief Justice; ROBB, VAN ORSDEL, GRONER, and STEPHENS, Associate Justices

Opinion

VAN ORSDEL, Associate Justice: These are three special appeals by the Secretary of the Interior, Harold L. Ickes, from orders of the

Supreme Court of the District of Columbia denying his motions to dismiss amended bills in equity brought by appellees, plaintiffs below, to restrain the defendant Ickes, as Secretary of the Interior, from the enforcement of certain public notices issued by his predecessor in office, Ray Lyman Wilbur, limiting plaintiffs' water right appropriations in the Sunnyside Unit of Yakima Project, a Federal Reclamation Project in the State of Washington, to an amount of water much less than the rights and privileges which plaintiffs enjoyed prior to the promulgation of the notices and orders in question.

Pursuant to the terms of the Reclamation Act of June 17, 1902, 32 Stats. 328, as amended, U. S. C., T. 43, Chap. 12, the United
45 States undertook the construction and operation of the Yakima Project. Acting under the law, the United States purchased from the Washington Irrigation Company the Sunnyside Canal, water appropriations and irrigation system used in connection therewith. In addition to the rights thus procured, the United States secured appropriations from the Yakima river system, pursuant, however, to the express provisions therefor in the laws of the State of Washington, and provided storage for the waters thus appropriated from the state in reservoirs constructed, owned, and operated by the United States. Plaintiffs were appropriators and owners of water rights in the Sunnyside Canal from the Washington Irrigation Company long prior to its purchase by the United States. Plaintiffs were required by the government, as a condition of procuring water for irrigation of their lands, to execute and deliver to the United States certain water-right obligations. In consideration of procuring these rights, plaintiffs were required to pay to the government of the United States "the sum of $10.00 per acre for the benefits to be derived from said project of the United States", which amount it is alleged has been fully paid and any claims therefor from the government, or liens thereunder, have been fully satisfied and discharged.

It is important at this point to ascertain the nature of the water-rights purchased from the United States by plaintiffs or their predecessors as stated in the several applications. In the Fox case: "The measure of the water right for said land is that quantity of water which shall be beneficially used for the irrigation thereof, but in no case exceeding the share proportionate to irrigable acreage, of the water supply actually available as determined by the project manager or other proper officer of the United States, or of its successors in control of the project, during the irrigation season for the irrigation of lands under said unit." In the Parks case the measure of the water right purchased is fixed in the application as follows: "The amount of water to be furnished hereunder shall be three (3) acre-feet of water per annum per acre measured at the land, or as much more water as will be required to successfully irrigate the land, the amount so required to be determined by the authorized agent of the United States, and the water shall be used only to irrigate said lands and for domestic purposes incident thereto; provided,

that the amount of water furnished shall be limited to the amount beneficially used upon such lands." In the Ottmuller case the water right application provided: "The quantity of water to be furnished thereto shall be three (3) acre-feet of water per annum per acre of irrigable land as aforesaid, measured at the land; or so much thereof as did constitute the proportionate share per acre from the water supply actually available for the lands under said project; provided, that the supply furnished shall be limited to the amount of water beneficially used on said irrigable land."

Plaintiffs, in their amended bills of complaint, base their rights to the use of water primarily on the rights acquired by them or their predecessors by purchase from the Washington Irrigation Company,

under which it is alleged there was furnished by the company
46 and beneficially used upon the lands in question. In the case of Parks, 6 acre-feet of water per acre per annum; in the case of Ottmuller, 5.56 acre-feet of water per acre per annum; and in the case of Fox, 4.84 acre-feet of water per acre per annum; which rights under the laws of the State of Washington became appurtenant to the lands and is real estate. (Rem. R. S. Wash., Sec. 7391.)

It is alleged by the plaintiffs in their respective bills that the United States completed the construction of the irrigation unit, constructed reservoirs of sufficient capacity to ben ficially and successfully irrigate all lands within said unit, and a determination had been made that the respective amounts originally acquired by the plaintiffs of water per acre per annum was necessary to beneficially and successfully irrigate the lands, and after the d livery of the water for several years and its beneficial use Congress passed on Act (38 Stat. 687; 43 U. S. C. A., Sec 469), providing: "No increase in the construction charges shall after August 13, 1914, be made, after the same have been fixed by public notice, except by agreem nt between the Secretary of the Interior and a majority of the water-right applicants and entrymen to be affected by such increase." This restriction was confirmed on September 24, 1914, by Franklin K. Lane, then Secretary, in a public notice, as follows: "The amount of the construction charge per irrigable acre for lands for which entry under the provisions of the Reclamation Act of June 17, 1902 (32 Stat. 388), or water-right application has heretofore been made, shall be the amount fixed in the several public notices heretofore issued for the respective lands and therein termed 'the building charge' and will not be increased, except as provided in said Reclamation Extension Act."

The statute law of the State of Washington provides: "The right to the use of water which has been applied to a beneficial use in the State shall be and remain appurtenant to the land or place upon which the same is used." (Remington's R. S., Sec. 7391). In view of this statute the successive Secretaries of the Interior construed the contracts as conveying to each purchaser a sufficient amount of water to beneficially and successfully irrigate his land. Indeed this was imperative under Sec. 8 of the Reclamation Act (43 U. S. C. A.,

Sec. 372), which provides: "The right to the use of water acquired under the reclamation law shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right."

It is alleged that "it was determined by the successive Secretaries of the Interior, their representatives, and their subordinates", that in the case of Parks, 6 feet of water per acre per annum; in the case of Ottmuller, 5.56 feet; and in the case of Fox, 4.84 acre feet "was necessary to beneficially and successfully irrigate said land; that pursuant to said practical construction and determination the successive Secretaries of the Interior, their representatives and subordinates, have for a period of more than 20 years, delivered to said land the amount of water necessary to beneficially and successfully irrigate the same, which water has at all times been beneficially used thereon for irrigation purposes."

It is alleged that in the year 1930 Elwood Mead, Commissioner of Reclamation of the United States, recommended the con-
47 struction of the Cle Elum Reservoirs at a cost of $3,500,000 for the purpose of storing water for the irrigation of lands in Kittitas Reclamation District, and also for the purpose of supplying water for the irrigation of lands in the Roza and Kennewick divisions of the Yakima Project. Mead, it is alleged, ascertained that the cost of the reservoir would be $1,000,000 more than the amount that would be returned to the reclamation fund from these divisions. It was necessary, therefore, before the commencement of reservoir construction that a source should be ascertained from which the $1,000,000 could be obtained. It is alleged that Mead accordingly, "without consulting these plaintiffs or other water users in said unit in said District, charged the sum of $1,000,000 to said unit in said District and furnished the Secretary of the Interior information that provision had been made for the payment by said unit of said sum."

It is also alleged that thereafter Mead and one Stoutemyer, District Counsel, and Secretary Wilbur, in order to compel the plaintiffs and other water users to contract to pay the sum of $1,000,000, caused the Assistant Secretary of the Interior on October 17, 1930, to issue an order which, among other things, provided: "The water applications and water-right contracts which determine the limit of the individual water rights in the Sunnyside Valley Irrigation District provided in most cases—

(A) For the delivery of three (3) acre-feet of water or so much thereof as is necessary for beneficial use in years of ordinary run-off in the Yakima River, with a provision for pro rata reduction in years of unusual drought or low water.

(B) Some of such applications or contracts provide for delivery of 3 acre-feet subject to a proviso 'that the amount of water furnished shall be limited to the amount beneficially used upon said lands.'

(C) Still other applications or contracts provide for the delivery of 3 acre-feet per annum per acre, 'or as much more water as will be required to successfully irrigate the land, the amount so required to be determined by the authorized agent of the United States', and subject to the proviso 'that the amount of water furnished shall be limited to the amount beneficially used upon such lands', and the further provision 'that the United States shall not be responsible for the failure to supply water under this contract caused by insufficient supply of water in the Yakima River, due to hostile diversion or unusual drought.'"

After a statement by the Assistant Secretary on the economical use of water for irrigation to avoid waste, and the additional storage capacities that would be supplied, and the statement that heretofore due to the fact that the Kittitas division of the Yakima project had not been completed, it had been possible to permit water users in the Sunnyside Valley irrigation District to use water in excess of amounts specified in their contracts and applications, it was ordered: "In order that all water users in the Sunnyside Valley Irrigation District may know in advance that economy in the use of water will hereafter be necessary, and be prepared to take care of the water and use it to the best advantage, notice is hereby given that as to all lands except those above referred to in paragraph (C), during
48 the year 1931 and subsequent years, until further notice, water deliveries in that district will be limited to three (3) acre-feet per irrigable acre per year, as specified in the said contracts and applications, except in years of unusual drought or low water, when it will be necessary to limit deliveries to a somewhat smaller amount as provided for in said contracts applicable to the lands of the District; provided, however, that so long as there is surplus stored water available not required to meet contract obligations to the United States to other parties, water in excess of three acre-feet may be rented by water users of the Sunnyside Valley Irrigation District of the classes referred to above as 'A' and 'B' whose rights are limited under their applications and contracts to 3 acre-feet. The water-rental charge for such extra water in excess of 3 acre-feet, used during the irrigation season of 1931, will be one dollar and fifty cents ($1.50) per acre-foot, and the rental rate will be announced annually for subsequent seasons. All money collected for the rental of such extra water will be applied toward the payment of the unsecured portion of the construction costs of the reservoir system of the Yakima project."

A further notice and order was given by the First Assistant Secretary of the Interior on May 5, 1932, in which a classification of the lands was made as those entitled to three acre-feet per acre, 3.5 acre-feet per acre, and four acre-feet per acre. This classification was made by one W. W. Johnson in a report of February 1932. It was then ordered that water users under these various classifications "except in years of unusual drought or low water, when water deliveries to said lands may be limited to less than the quantities herein

designated, the amount indicated for that class will constitute the required water deliveries to said land"; and that water deliveries beginning with the irrigation season of 1932 "in excess of the above determined quantity per acre, will be suggested to water-rental charges at rates established in public notice for the irrigation season of 1932 and in subsequent public notices."

These orders amounted to notice to Fox and Ottmuller that they would be deprived of all water rights in excess of three acre-feet of water per annum, and that Parks would likewise be deprived of all water rights in excess of 3½ acre-feet per annum, unless plaintiffs would sign a new water rental application which they, together with all other water-rights applicants, refused to sign. This application provided as follows: "The undersigned applicant requests excess water under public notice issued by the Secretary February 19, 1932, and agrees to pay applicable charges, with 6% interest from December 1, 1932, until paid. He further agrees that water may be withheld from his land after 1932 until such charges are paid. It is understood that advance payment for excess water will be required in 1933, if the 1932 rental charge remains unpaid at that time."

We are confronted again by the usual contention that this is a suit against the United States, and as such cannot be maintained. This is urged on the theory that the action is one to require the specific performance of a contract with the United States. This is not an action for specific performance. It is an action to restrain the Secretary of the Interior from enforcing the alleged illegal orders issued by
49 that officer and his predecessor in office in his capacity as the administrative agent of the government for the construction of irrigation works and the disposition of the same under the Reclamation Act. (38 Stat. 690, Sec. 15; 43 U. S. C. A., Sec. 373.) The suit, therefore, is one against an agent of the government and not against the government itself, since no complaint is here made by the plaintiffs of the existing contracts between them and the government. The validity of the contracts between the government and the plaintiffs is not here in issue. The question is whether or not the orders promulgated amount to a valid and enforceable extension of the terms of the contract. If not the orders will be determined as unenforceable and the contracts will remain valid as if the orders had never been issued.

This brings us to the consideration of the authority of the Secretary to issue the orders here in question. The water rights here involved were primarily derived through the contracts of the plaintiffs or their predecessors with the Washington Irrigation Company. Under that authority, and in conformity with the laws of the State of Washington, the plaintiffs acquired sufficient water, beneficially used, to irrigate their lands, and these rights were not subsequently modified to any extent by the contracts entered into with the government after the government had acquired the rights of the Washington Irrigation Company. While in two of the contracts here in question the amount is fixed at 3 and one at 3½ feet per acre, this seems to have been put

in as a minimum amount, since there was a further qualification permitting of the use of sufficient water to beneficially and successfully irrigate their lands. This is the legal measure of right to use fixed by the laws of the State of Washington and by the Reclamation Act. This amount had been fixed through prior application and use of the water at six feet per acre in the case of Parks, 4.84 feet per acre in the case of Fox, and 5.56 feet per acre in the case of Ottmuller. This amount was found to be necessary to beneficially and successfully irrigate the land; and under Section 7390 Rem. Rev. Stat. of Washington, "the right to the use of water which has been applied to beneficial use in the State shall be and remain appurtenant to the land or place upon which the same is used."

Under the Reclamation Act the United States, in putting in an irrigation enterprise, stands in the same position with relation to the State as a private individual. The waters belong to the State, and the United States never acquires any title therein any more than a private appropriator.

It is settled irrigation law that mere diversion and storage of water does not constitute an appropriation. Before there can be an appropriation the water must be applied to a beneficial use. Highland Ditch Company v. Union Reservoirs Company, 127 Pac. 1025. In Paine Irrigation District v. Board of Commissioners, 236 Fed. 790, the court, considering constitutional and statutory provisions similar to those of the State of Washington, held that under the Constitution and statute relating to water rights, as construed by the Supreme Court of the State, no property right can be acquired in the use of water until it is applied to a beneficial use. The owner of the carrying ditch gets no title or right to the use of the water and has
50 no property in it subject to disposal, but such property right of disposal is in him who applies the water to beneficial use.

It is clear, therefore, that the United States under the proceedings provided in the Reclamation Act acquires no title to the water. It is merely a carrier and distributor of the water, and the only title acquired which consists only of a right of use is in the appropriator who applies the water to a beneficial use. To proceed under the Reclamation Act the United States must make application for a permit to appropriate the waters and to distribute it for beneficial purposes. The state does not surrender its right to control its use. The 1,000 cubic feet appropriated in 1891 was appropriated by the application of the water to beneficial use, and under such circumstances the water becomes a part and parcel of the land and is appurtenant thereto. This rule was recognized in the Reclamation Act (43 U. S. C. A., Sec. 372), where it is specifically provided that the water right is appurtenant to the lands irrigated.

Secretary Garfield in 1909, pursuant to 43 U. S. C. A., Sec. 419, made a finding as to the cost of the irrigation system in addition to the purchase price paid the Washington Irrigation Company, and fixed the price at $52.00 per acre, which sum would return to the Reclamation fund the total cost of the Project. A public notice and

order was issued fixing this charge. It is alleged that under the administration of the Reclamation Act prior to the action of Mead and Wilbur and the orders here complained of, the Reclamation Act was construed, and the contracts made thereunder were construed, as holding that water users were entitled to a sufficient amount of water to beneficially and successfully irrigate their lands; and that it was determined by successive Secretaries that 4.84 feet per annum was necessary for the Fox land, 5.56 feet for the Ottmuller land, and 6 feet for the Parks land, to beneficially and successfully irrigate the same. In accordance with these ascertained facts, Congress passed the Reclamation Extension Act of August 13, 1914, which, among other things, provides: "No increase in the construction charges shall, after August 13, 1914, be made, after the same have been fixed by public notice, except by agreement between the Secretary of the Interior and a majority of the water-right applicants and entrymen to be affected by such increase. 38 Stats. 687, 43 U. S. C. A. 469.

Pursuant to this Act Franklin K. Lane, then Secretary of the Interior, on September 24, 1914, issued a public notice and order as follows: "The amount of the construction charge per irrigable acre for lands for which entry under the provisions of the Reclamation Act of June 17, 1902 (32 Stats. 388), where water-right application has heretofore been made, shall be the amount fixed in the several public notices heretofore issued for the respective lands and therein termed 'the building charge', and will not be increased, except as provided in said Reclamation Extension Act." It is alleged in substance that the Sunnyside Irrigation District was organized in 1918, and a contract was entered into with the United States under which the District assumed and agreed to pay construction charges to the extent of $2,000,000 and all obligation and maintenance charges. In pursuance of 43 U. S. C. A., Sec. 512, the Secretary released all liens on the lands of said unit for construction, operation, and maintenance charges.

51 The court below was right in overruling the motions to dismiss the bills of the respective plaintiffs, and the order denying the motions is affirmed.

JOSIAH A. VAN ORSDEL,
Associate Justice.

Dissenting opinion

STEPHENS, Associate Justice, dissenting: In my opinion the United States is a necessary party to these suits; and since it has not consented to be sued, they cannot proceed. Necessary parties are those "affected by the judgment and against which in fact it will operate . . .". Minnesota v. Hitchcock, 185 U. S. 373, 387. Whether or not title to the water in question is in the United States, the latter is a party to contracts to deliver water. If the asserted reductions made by United States officials in the amounts of water to

be delivered under the contracts were illegal, then the United States is bound to deliver the former amounts. If the reductions are legal, it is not so bound and may therefore, for a consideration valuable to itself, contract for delivery of the difference to the plaintiffs, if they desire it, or to third parties. The point is, in my opinion, controlled by the principle actuating the decisions in: Payne v. Central Pac. Ry. Co., 255 U. S. 228; Northern Pac. Ry. Co. v. North Dakota, 250 U. S. 135; Wells v. Roper, 246 U. S. 335; Lane v. Watts, 234 U. S. 525; United States v. Lee, 106 U. S. 196; Transcontinental & Western Air v. Farley, 71 F. (2d) 288, certiorari denied, 293 U. S. 603. This principle and the application thereof I discussed in my separate opinion in Township of Franklin et al. v. Rexford G. Tugwell et al., decided by this court May 18, 1936, — App. D. C. —, — F. (2d) —. In respect of the situation here involved, I think Wells v. Roper and Transcontinental & Western Air v. Farley are in point and controlling.

52 In United States Court of Appeals

No. 6542, April Term, 1936

HAROLD L. ICKES, SECRETARY OF THE INTERIOR, APPELLANT

vs.

PHILIP LOUIS PARKS AND OLLIE D. PARKS, HIS WIFE

Judgment

June 8, 1936

Appeal from the Supreme Court of the District of Columbia.

This cause came on to be heard on the transcript of the record from the Supreme Court of the District of Columbia, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged, and decreed by this Court that the order of the said Supreme Court in this cause be, and the same is hereby, affirmed.

Per Mr. Justice VAN ORSDEL.

JUNE 8, 1936.

Dissenting opinion by Mr. Justice Stephens.

53 *Memorandum: Motion to stay mandate filed June 17, 1936*

54 In United States Court of Appeals

[Title omitted.]

Order granting motion to stay mandate

July 6, 1936

On consideration of Appellant's motion for a stay of the mandates herein, under Rule 24, pending application for certiorari to the Supreme Court of the United States, It is ordered by the Court that the motion be, and it hereby is, granted.

55 In United States Court of Appeals for the District of Columbia

[Title omitted.]

Designation of record

Filed June 23, 1936

The clerk, in the preparation of the transcript of record on petition for certiorari to the Supreme Court of the United States, will include the following:

1. Printed record.
2. Note of argument.
3. Opinion of the court.
4. Decree.
5. Memorandum of filing motion to stay mandate.
6. Minute entry granting stay of mandate.
7. This designation.
8. Clerk's certificate.

STANLEY REED,
Solicitor General.

[File endorsement omitted.]

56 [Clerk's certificate to foregoing transcript omitted in printing.]

57 Supreme Court of the United States

Order allowing certiorari

Filed October 12, 1936

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

U. S. GOVERNMENT PRINTING OFFICE: 1936

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 268

HAROLD L. ICKES, SECRETARY OF THE INTERIOR, PETITIONER

vs.

JACOB F. OTTMULLER

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

PETITION FOR CERTIORARI FILED AUGUST 7, 1936

CERTIORARI GRANTED OCTOBER 12, 1936

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 268

HAROLD L. ICKES, SECRETARY OF THE INTERIOR, PETITIONER

vs.

JACOB F. OTTMULLER

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

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1 [Caption omitted.]

In Supreme Court of the District of Columbia, holding an equity court

Equity No. 57740

JACOB F. OTTMULLER, PLAINTIFF

vs.

HAROLD L. ICKES, SECRETARY OF THE INTERIOR, DEFENDANT

Bill of complaint

Filed September 24, 1934

To the honorable Supreme Court of the District of Columbia, holding an equity court:

The plaintiff respectfully represents that he is a citizen of the United States and of the State of Washington, residing near Mabton, in Yakima County, Washington, and that his post-office address is Mabton, Washington, and that he brings this suit in his own right and in his own behalf against Harold L. Ickes, a citizen of the State of Illinois, residing in the District of Columbia in respect of the matters and things hereinafter set forth.

I

That the plaintiff is an unmarried man and the sole owner and in possession of the following-described real estate located within the Sunnyside unit of the Yakima project, to wit: The southwest quarter of the southeast quarter of section 31, township 9 north, range 23 E., W. M., being lots one to eighteen in block one East Park Addition to Mabton, and that there is appurtenant to said land a water right for a sufficient amount of water to beneficially and successfully irrigate the same from the natural flow of the Yakima River and storage reservoirs hereinafter mentioned, constructed under and by virtue of the Reclamation Act herein referred to, and the right to have

2 said water stored and impounded in the reservoirs herein described and carried in said river and in the canals and distribution system of the Sunnyside unit of the Yakima project to said land; that the amount of the water so appurtenant to plaintiff's land is in excess of five and one-half acre-feet per acre per annum, measured at the land during the irrigation season and the absolute title to said water right and said easement vests in the plaintiff and said water right and easement are real estate.

II

That the defendant is now and has been since, to wit: March 5th, 1933, the duly appointed, qualified, and acting Secretary of the

Interior of the United States, and as such has charge of the administration of the laws of the United States relating to irrigation and reclamation projects constructed by the United States, and particularly of the administration of the act of Congress known as the Reclamation Act, being the act of June 17th, 1902 (32 Stat. 388), as amended and supplemented by later acts of Congress, and that said defendant is sued in his official capacity as such Secretary of the Interior as hereinafter set forth.

III

That in 1906, the then Secretary of the Interior approved an irrigation and reclamation project known as the Sunnyside unit of the Yakima project, which included the land herein described and on behalf of the United States of America purchased from the Washington Irrigation Company, the Sunnyside Canal, water appropriations, and irrigation system used in connection therewith; that thereafter and on March 2nd, 1909, the then Secretary of the Interior, by public notice and order, fixed the price to be charged each irrigable acre of the lands herein described and other lands in private ownership, at the sum of $52.00 per acre; that in fixing and determining construction charges to be made and collected in said unit, the then Secretary of the Interior estimated and allocated the cost of the various features of said project, including reservoirs for storage purposes common to said unit, and the charge per acre for irrigable lands included within said unit as estimated by the then Secretary of the Interior were sufficient according to said allocation to return to the Reclamation fund of the United States the sum that had been expended or would be expended in the building and construction of the storage reservoirs and irrigation system; that thereafter the then Secretary of the Interior did cause to be constructed and completed, storage reservoirs by which the flood water of the Yakima River and its tributaries were collected and impounded during the period of freshets, high water, and during the season when water was not needed for irrigation and of sufficient capacity to furnish sufficient water in normal seasons to beneficially and successfully irrigate the land herein described and all other lands in the Sunnyside unit of the Yakima project and all other lands entitled to receive water from the Yakima River and said storage reservoirs.

3 IV

That about the time of the purchase by the Secretary of the Interior for the United States of said irrigation system and at the time the construction of said project was contemplated and considered by the then Secretary of the Interior, it was stated and represented by the then Secretary of the Interior, his representatives and subordinates, that before said project could be purchased or the construction of said works could be undertaken, that the owners of the

land herein described and other lands susceptible to irrigation by gravity flow from said system should cooperate with the then Secretary of the Interior to the extent of incorporating the Sunnyside Water Users Association and placing their said private lands in said project and agreeing to take water for the purpose of irrigating their said lands from said project and that for the purpose of inducing said landowners of said private lands to so cooperate with the then Secretary of the Interior and to incorporate the Sunnyside Water Users Association and to place their lands under said project and agree to take water therefrom and execute a stock-subscription contract and water-right application for the purchase of the water therefrom, it was represented and stated by the representatives and subordinates of the then Secretary of the Interior that beneficial use was the basis, the measure, and the limit of the water right that would be furnished and that a sufficient amount of water would be furnished to successfully and beneficially irrigate the land herein described at all times during the irrigation season, save, and except in extremely dry years, and that the entire cost of building and constructing said completed works would not exceed the sum of $52.00 per acre; that said representations and statements so made by the Secretary of the Interior of the United States and by his representatives and his subordinates were made on numerous occasions and at mass meetings held by said private landowners at the request of said representatives and subordinates for the purpose of considering the advisability of entering into said arrangement and aiding and participating in the construction and promotion of said enterprise; that at that time the question as to the amount of water that would be delivered and the cost to the owner of said land in the construction and completion of said project were matters of vital importance and were also matters as to which the then owners of the land herein described were not otherwise advised and they were compelled to rely upon the statements and representations of the then Secretaries of the Interior, their representatives and subordinates.

V

That the then owners of the land herein described and predecessors in title of plaintiff relied absolutely and entirely upon the aforesaid statements and representations and upon the statements and representations in this complaint set forth, believed them to be true and would not, except for such statements and representations, have participated in the incorporating said Sunnyside Water Users Association and would not have subscribed for shares of stock therein and would not have executed the water-right application as herein alleged to take water for their said land from said project
4 but for such statements and representations; that being induced and persuaded thereby, the then owners of the land herein described and the owners of additional land under gravity flow of said irrigation system did, as a matter of fact, proceed to in-

corporate the Sunnyside Water Users Association as herein set forth and that said association by reason of such statements and representations and inducements was organized and incorporated and thereafter a contract was entered into between said association and the then Secretary of the Interior acting for and on behalf of the United States, a copy of which is hereto attached marked "Exhibit A" and made a part hereof; that thereafter the then owners of the land herein described executed the required stock-subscription contract with said association.

VI

That thereafter and before the owners of the land herein described could procure water for the irrigation of said land from the irrigation system so constructed by the United States as aforesaid, it was necessary that they make, execute, and deliver to the United States water-right applications for water to be used upon and in the irrigation of their land; that the then owners of the land herein described, relying upon the statements and representations herein alleged and set forth, executed a water-right application, a copy of which is hereto attached, marked "Exhibit B" and made a part hereof; that by the terms of said water-right application said owners contracted and agreed to pay to the United States for the water so made available for the irrigation of their lands the sum per irrigable acre that was fixed and announced by the then Secretary of the Interior by public notice, to wit: $52.00 per acre.

VII

That Agnes E. Phillips and T. S. Phillips, her husband, were on February 28th, 1912, the owners in fee simple of the land herein described, bona fide residents and occupants thereof; that they did not own any other land in Federal reclamation project and that they acted for and on behalf of themselves and not at the instance or request of any other person, association, or corporation, either directly or indirectly, and being fully qualified under the Reclamation Act and acts amendatory thereof and supplementary thereto, they did make a water-right application to purchase from the United States, pursuant to the terms of said Reclamation Act, a water right for said land and did agree to pay for said water right the sum of $52.00 per acre; that thereafter the plaintiff acquired all right, title, and interest of said applicants in and to said land and water right; that the plaintiff and his predecessors in title paid to the United States the sum of $52.00 per acre and also all operation and maintenance charges that have heretofore accrued, and on February 28th, 1934, a water right for said premises was conveyed by the United States of America to the plaintiff herein.

VIII

That by the terms of the Reclamation Act and acts amendatory and supplemental thereto the Secretary of the Interior is charged

with the administration thereof; that for a period of more
5 than twenty years after the execution of the aforesaid water right application the representatives and subordinates of the then Secretaries of the Interior and their representatives and subordinates, uniformly construed said acts of Congress and said contracts as requiring the delivery to said land of such amount of water that was necessary to beneficially and successfully irrigate the same, which said amount for a period of more than twenty years was actually determined by the representatives and subordinates of the then Secretaries of the Interior by going upon said land from time to time and from a factual investigation as to the water requirements of various crops growing on or to be planted on said land, the condition of the soil, climatic conditions, and other facts, which said representatives and subordinates obtained upon said personal investigation and examination; that after said information was so obtained the representatives and subordinates of the then Secretary of the Interior made a determination of the amount of water necessary to successfully and beneficially irrigate said land, and after said determination was so made and that at all times during each irrigation season from the date of said water right application in 1912, until about August 17th, 1934, the then Secretary of the Interior and his representatives and subordinates, save and except two years of extreme water shortage, actually delivered to said land the amount of water so determined to be necessary to beneficially and successfully irrigate the same and the crops growing thereon, which said amount fluctuated from year to year depending upon crop requirements and climatic conditions; that the amount of water so determined to be necessary by the representatives and subordinates of the Secretaries of the Interior to beneficially and successfully irrigate said land and the amount actually delivered each year to said land on an average for more than twenty years was between five and one-half and six acre-feet per acre per annum, measured at the land and the amount actually so determined to be necessary and delivered on an average during the past ten years and beneficially used without waste to irrigate said land was 5.56 acre-feet, measured at the land.

IX

That the Reclamation Act under and pursuant to which the then Secretary of the Interior authorized the purchase of the Sunnyside Canal and the building and construction of the reservoirs and distribution system and under and by virtue of which contracts herein referred to were executed and which became a part of each of said contracts gives the following measure of a water right for said land, to wit:

"That the right to the use of water acquired under the provisions of this act shall be appurtenant to the land irrigated and beneficial use shall be the basis, the measure, and the limit of the right."

that the contract between the then Secretary of the Interior acting for the United States and the Sunnyside Water users Associaion herein referred to expressly provides:

"That in all the relations between the United States and this association and the members of the association, the rights of the members of the association to the use of water where the same have vested, are to be defined, determined, and enjoyed in
6 accordance with the provisions of the said act of Congress and of other acts of Congress on the subject to the acquisition and enjoyment of the rights to use water, and also by the laws of the State of Washington, where not inconsistent therewith, modified, if modified at all, by the provisions of the articles of incorporation and bylaws of said association;"

that under the decisions of the Supreme Court of the State of Washington where water is beneficially used upon lands for irrigation purposes, the same becomes appurtenant to the land on which the water is so used and said water cannot be diverted from said land without the consent of the owner thereof, and said water right is real estate.

X

That the plaintiff and his predecessors in title to said land and water right relying upon the statements and representations as herein alleged, made by the then Secretary of the Interior, his representatives and subordinates and the determination made by the Secretaries of the Interior, their representatives and subordinates as to the amount of water actually necessary to successfully and beneficially irrigate said land over a term of years and the actual delivery by said representatives and subordinates of the Secretaries of the Interior of the amount of water so determined to be necessary to successfully irrigate said land, joined with other water users in said Sunnyside unit in 1918, in the organization and incorporation of the Sunnyside Valley Irrigation District and authorized said district to enter into contract with the United States of America, by the terms of which the land herein described was bound to pay the charges of all other land in said unit and in said district in the event the owner thereof did not pay to the extent of $2,000,000.00.

XI

In the practical administration of said project the Secretaries of the Interior, their representatives, and subordinates have, for a period of twenty years, consistently construed the Reclamation Act to require the delivery to said land herein described of that amount of water during the irrigation season which was necessary to beneficially and successfully irrigate the same and actually determined from a factual investigation from time to time during said period that from five and one-half to six acre-feet of water per acre per annum, measured at the land, was necessary to beneficially and suc-

cessfully irrigate the same and in the operation of said project have consistently, for a period of more than twenty years, actually delivered the amount of water so determined to be necessary to beneficially irrigate said land without requiring any additional payment on account of construction, and at all times prior to the acts of the defendant, his representatives, and subordinates herein alleged have so construed the plaintiff's rights with respect to water to irrigate said land that he was the owner of a sufficient amount of water to beneficially and successfully irrigate the same, amounting to from five and one-half to six acre-feet.

7 XII

That the defendant made an order and ruling that unless the plaintiff signed a contract to pay rental for all water in excess of three acre-feet, that no water above said amount would be permitted to flow on his land, and that the same would be diverted, and notified the plaintiff that unless he signed the water rental application for water in excess of three acre-feet per acre per annum, measured at the land, in the words and figures following, to wit:

"WATER RENTAL APPLICATION

"The undersigned application requests excess water under public notice issued by the Secretary February 19, 1932, and agrees to pay applicable charges, with 5% interest from December 1, 1934, until paid. He further agrees that water may be withheld from his land after 1934 until such charges are paid. It is understood that advance payment will be required in 1935 if the 1934 rental charge remains unpaid at that time.

"Witness: "Water user;

"_____ _____ _____ _____"

that no water in excess of three acre-feet per acre per annum would be delivered to the land herein described; that the head gates would be shut down to the land herein described to three acre-feet per acre per annum, measured at the land; that the defendant, as Secretary of the Interior of the United States, his representatives and subordinates acting under his direction, contrary to the terms of the Reclamation Act herein referred to, contrary to the terms of the contract between the Sunnyside Water Users Association and the United States herein referred to, contrary to the plain wording of said act of Congress, and said contract, contrary to the practical construction of said act of Congress and contract by the then Secretaries of the Interior, his representatives and subordinates, acting under his direction and with his knowledge and consent, for a period of more than twenty years, that said land was entitled to the amount of water that could be beneficially used thereon, contrary to the determination of the representatives and subordinates of the then Sec-

retaries of the Interior as to the amount of water necessary to beneficially and successfully irrigate said land and contrary to the decisions of the Supreme Court of the State of Washington that when water is beneficially used upon land it becomes appurtenant thereto and the title passes to the owner of the land, did on or about August 17th, 1934, shut off the supply of water from the land of the plaintiff herein described in excess of three acre-feet per acre per annum, measured at the land; that at the time said head gates were so shut down, ample water was available and in storage reservoirs and flowing in the Yakima River and in the Sunnyside Canal and laterals flowing therefrom to furnish said land and all other land within the Sunnyside unit of the Yakima project and to furnish all other lands entitled to receive water from said reservoirs and from the Yakima River to successfully and beneficially irrigate the same during the remainder of the irrigation season of 1934 and leave a surplus of 200,000 acre-feet unused in said reservoirs.

8

XIII

That at the time said head gates were shut down on August 17th, 1934, the title to the 40% of the water necessary to beneficially and successfully irrigate said land, which was diverted therefrom, was vested in the plaintiff and was appurtenant to said land; that the title to said water vested in the plaintiff as soon as it was impounded in storage reservoirs and when it was flowing in the Yakima River and Sunnyside Canal and irrigation system; that the plaintiff was the owner of an easement in said irrigation system necessary for the purpose of carrying said water and that the representatives and subordinates of the defendant who were in charge of said irrigation system and who had charge of the delivery of the water so owned by the plaintiff were merely performing a ministerial and executive duty in delivering said water to plaintiff prior to the time said head gates were shut down; that it is the executive and ministerial duty of said representatives and subordinates to open said head gates and to permit the water owned by plaintiff to flow thereon and the defendant by his acts, as herein alleged, prevent them from performing that duty and tend to bring the United States into disrepute.

XIV

That the order and ruling requiring a new contract in the form of water rental application to be entered into as hereinabove alleged and set forth and the acts of the defendants and his representatives and subordinates in shutting down the head gates to three acre-feet per acre per annum, measured at the land and diverting from plaintiff's land and not permitting to flow thereon, the remainder of the water owned by him, were arbitrarily made and done and were not made in good faith and were made without regard to and in violation of the act of Congress aforesaid, the contract referred to

herein, the practical construction of said act of Congress and contract between the then Secretaries of the Interior, their representatives, and subordinates acting under their direction for a period of more than twenty years and without regard to the determination made by the representatives and subordinates of the then Secretaries of the Interior as to the amount of water necessary to successfully and beneficially irrigate said land and the amount of water that was actually delivered to said land for a period of twenty years prior to said date and without regard as to the amount of water actually available or necessary to beneficially and successfully irrigate said land and without regard to the decisions of the Supreme Court of the State of Washington to the effect that where water is beneficially used to irrigate land it becomes appurtenant thereto; that in making said ruling requiring said water rental contract to be executed and in shutting down the head gates as aforesaid the defendant, his representatives, and his subordinates acting under his direction, failed to exercise an honest judgment and failed to exercise any judgment whatever and failed to exercise good faith and arbitrarily made said order and arbitrarily shut down said head gates for the express purpose and intent of coercing and forcing the plaintiff and other owners of land in the Sunnyside unit of the Yakima project and
9 located within the Sunnyside Valley Irrigation District to authorize said district to enter into contract with the United States of America to purchase a supplemental water right for their said lands, including the land herein described, over and above the water rights theretofore purchased at a cost of $1,000,000.00 and binding the last faithful acre of land in said district and the land herein described to pay said sum, and all of said acts were contrary to the terms of and in violation of the terms of the Reclamation Act herein referred to and in violation of the terms of the contracts herein referred to and in violation of the construction of said act of Congress and contracts by the Secretaries of Interior and their representatives and subordinates acting under their direction for a period of more than twenty years and in violation of the practical determination by the representatives and subordinates of the Secretaries of the Interior over a period of twenty years as to the amount of water necessary to successfully and beneficially irrigate said land or the amount that could be beneficially used thereon or the amount of water available for the irrigation thereof and were arbitrary and unreasonable and were not made or done in good faith and the effect of said acts by the defendant, his representatives and subordinates, was to deprive the plaintiff of more than 40% of the water owned by him and which was appurtenant to his said land and in violation of vested rights of the plaintiff.

XV

That said order and notice issued by the defendant and the requirements that the head gates to plaintiff's land be shut down to

three acre-feet unless said water rental application was executed as herein alleged, was an attempt on the part of the defendant, his representatives and subordinates to collect from the plaintiff and other water users in the Sunnyside unit of the Yakima project the additional sum of $1,000,000.00 and also was an attempted evasion and violation of the express terms of the act of Congress passed and approved in 1914 (38 Stat. 687), which expressly provides that no increase in the construction charges shall hereafter be made after the same have been fixed by public notice, except by agreement between the Secretary of the Interior and a majority of the water right applicants and entrymen to be affected by such increase; that the majority of the water right applicants in the Sunnyside unit of the Yakima project and in said district and none of them ever consented to an increase in the construction charges.

XVI

That there was on August 17th, 1934, and has been at all times since said date an ample supply of water available to furnish the plaintiff the water necessary to beneficially and successfully irrigate his said land and to beneficially and successfully irrigate all lands in the Sunnyside unit of the Yakima project and all other lands entitled to receive water from said storage reservoirs and from the Yakima River and said water has been actually impounded in said storage reservoirs and a portion of which was diverted from the Yakima River and was flowing in the main Sunnyside Canal and laterals leading therefrom at the time the head gates were shut down as aforesaid.

10

XVII

That the plaintiff is informed and believes and therefore asserts that Harold L. Ickes, as Secretary of the Interior, his representatives and subordinates intend and purpose to continue keeping the head gates to plaintiff's land closed and locked so that not more than three acre-feet of water per acre per annum will be permitted to flow on plaintiff's land and to continue to divert and destroy the remainder of the water owned by the plaintiff, to wit: To divert and destroy about two and one-half acre-feet of the water owned by the plaintiff.

XVIII

That the threatened acts of Harold L. Ickes, Secretary of the Interior, his representatives and subordinates to continue keeping the head gates closed so that not to exceed three acre-feet of water will flow on said land and diverting and destroying the remainder of the water belonging to the plaintiff is unwarranted, arbitrary, and illegal and that if consummated, it will deprive the plaintiff of valuable property rights acquired in good faith by virtue of the Reclamation Act, contract with the Sunnyside Water Users' Association, practical construction of said act of Congress and contract

by the then Secretaries of the Interior and their representatives and subordinates a period of twenty years as to the amount of water that plaintiff and his predecessors in title were entitled to receive from said water supply and the amount necessary to beneficially and successfully irrigate said land and the amount of water delivered thereto and the rights acquired by the beneficial application of said water to said land for a period of more than twenty years, by virtue of which, under the laws of the State of Washington, which are applicable, the title to the amount of water necessary to beneficially irrigate said land vested in the plaintiff and further, in that the said Harold L. Ickes, Secretary of the Interior, his representatives and subordinates, are without power or authority to set aside the practical construction by his predecessors in office, their representatives and subordinates in the determination of the amount of water plaintiff was entitled to receive under said act of Congress and said contract and the plain wording of said act of Congress and said contract, and to nullify the decisions of the Supreme Court of the State of Washington to the effect that where water is beneficially used upon land it becomes appurtenant to the land the title vests in the owner of said land.

XIX

That plaintiff has no plain, adequate, or complete remedy at law and effective relief can only be administered in a court of equity. The injury to plaintiff is not measurable in damages and is irreparable and cannot be compensated for in an action at law.

XX

That this suit arises under the Constitution and laws of the United States and involves the construction of the Constitution of the
11 United States, acts of Congress and the construction of contracts entered into by the United States of America; that the amount of the value of the matter in controversy herein between the plaintiff and the defendant exceeds the sum of $3,000.00, exclusive of interests and costs.

Wherefore, the plaintiff prays:

1. That the process of this court issue directed to the defendant Harold L. Ickes, Secretary of the Interior requiring him to appear and make answer to the foregoing bill of complaint, but not under oath, answer under oath being hereby expressly waived.

2. That upon the filing of this bill or at such time thereafter as shall be fixed by the court, a preliminary order may issue herein enjoining pendente lite, the defendant, his successors in office and each and every and all persons claiming to act under his authority and control from diverting from plaintiff's land, any portion of the water owned by him and requiring the head gates to plaintiff's land to be so adjusted that the amount of water owned by plaintiff and which he is entitled to have flow on said land may flow thereon and requiring the defendant to desist from enforcing the orders heretofore issued by him requiring the execution of said water in excess of

three acre-feet, and that upon the final determination of this action such injunctive order be made perpetual and permanent.

3. That the plaintiff may have such other and further relief as the nature of the case may demand and require and may be agreeable to equity.

STEPHEN E. CHAFFEE,
Attorney for Plaintiff.
PRESTON B. KAVANAGH,
P. C. KING, JR.,
Attorneys for Plaintiff.

[*Duly sworn to by Jacob F. Ottmuller; jurat omitted in printing.*]

Exhibit A to bill of complaint

CONTRACT BETWEEN THE SUNNYSIDE WATER USERS ASSOCIATION AND THE SECRETARY OF THE INTERIOR

These articles of agreement, made and entered into this 7th day of May 1906, by and between the United States of America, acting in this behalf by E. A. Hitchcock, Secretary of the Interior, party of the first part, and the Sunnyside Water Users Association, a corporation duly organized and existing under the laws of the State of
12 Washington, party of the second part, their successors and assigns, witnesseth:

That whereas the Sunnyside Water Users Association is a corporation organized and existing under the laws of the State of Washington for the purposes mentioned in its articles of incorporation and bylaws, a copy of which is appended to this agreement and is, for every purpose of the interpretation, construction, and consideration of this agreement and of the rights of the parties hereunder, to be deemed, held, read, and considered as if fully written out or printed herein, and deemed a part hereof; and

Whereas the lands embraced within the area proposed to be irrigated as described in said articles of incorporation or bylaws are naturally desert and arid and incapable of proper cultivation without irrigation, and will to a greater or less extent remain unreclaimed, unfit for habitation, and uncultivation, in which condition they, or a great part thereof now are, unless the waters of the Yakima River in State of Washington, and its tributaries be impounded and the flow thereof otherwise regulated and controlled; and

Whereas the Secretary of the Interior contemplates the construction of certain irrigation works under the provisions of an act of Congress entitled "An act appropriating the receipts from the sale and disposal of public lands in certain States and Territories to the construction of irrigation works for the reclamation of arid lands", approved June 17, 1902, for the irrigation and reclamation of the lands described in the said articles or bylaws; and

Whereas the incorporators and shareholders of said Sunnyside Water Users Association are, and under the provisions of its articles of incorporation and bylaws must be, owners and occupants of lands

in said area, and in some cases are appropriators of water for the irrigation thereof, and in addition thereto such incorporators and shareholders and their successors or assigns must initiate rights to the use of water from the said proposed irrigation works, to be constructed by the Secretary of the Interior as soon as such rights may be initiated, and thereafter complete the acquisition thereof in the manner and upon the terms and conditions to be prescribed therefor by the Secretary of the Interior, which rights shall be, and thereafter continue to be, forever appurtenant to designated lands owned by such shareholders; and

Whereas neither the relative priority nor the extent of the individual appropriations of such water heretofore made by said incorporators and shareholders for the lands described in said articles or bylaws, and which are now vested rights, have been ascertained or determined, but said incorporators and shareholders have agreed, among themselves, by the terms and provisions of said articles of incorporation and bylaws, upon the rules and principles by and upon which the relative priority and the extent of their several appropriations and vested rights to the use of such waters shall be determined:

Now therefore, it is agreed and understood by and between the parties hereto,

1. That if the Secretary of the Interior shall authorize and cause the construction of said irrigation works, the said association will take prompt action to secure the determination by the courts
13 of the relative rights of its shareholders to the use of water for said lands, and that in the determination of such rights and of their respective rights to the use of water acquired under said act of Congress the rules and principles set out in said articles of incorporation and bylaws, for such determination, shall be deemed the established rules and principles for that purpose.

2. That only those who are or who may become members of said association, under the provisions of its articles of incorporation and bylaws, shall be accepted as applicants for rights to the use of water available by means of said proposed irrigation works.

3. That the aggregate amount of such rights to be issued shall, in no event, exceed the number of acres of land capable of irrigation by the total amount of water available for the purposes being (1) the amount now appropriated by the shareholders of the said association, and (2) the amount to be delivered from all sources in excess of the water now appropriated; and that the Secretary of the Interior shall determine the number of acres so capable of such irrigation as aforesaid, his determination to be made upon due and expert consideration of all available data, and to be based upon and measured and limited by the beneficial use of water.

4. That the payment for the water rights to be issued to the shareholders of said association, under the provisions of said act of Congress, shall be divided into not less than ten annual payments, the first of which shall be payable when the water is first delivered from

said works, or within a reasonable time thereafter, and after due notice thereof by the Secretary of the Interior to the association, and that the cost of said proposed irrigation works shall be apportioned equally per acre among those acquiring such rights.

5. That the said Water Users Association hereby guarantees the payments for that part of the cost of the irrigation works which shall be apportioned by the Secretary of the Interior to its shareholders, and will promptly levy calls or assessments therefor and for the cost of maintenance and operation as may be assessed from year to year by the Secretary of the Interior, and collect or require prompt payment thereof in such manner as the Secretary of the Interior may direct; that it will promptly pay the sums collected by it to the receiver of the local land office for the district in which said lands are situated; that it will promptly employ the means provided and authorized by the said articles of incorporation or bylaws for the enforcement of such collections, and will not change, alter, or amend its articles of incorporation or bylaws in any manner whereby such means of collection, or the lien given to it by the shareholders to secure the payment thereof, or of any assessments contemplated or authorized thereby, shall be impaired, diminished, or rendered less effective, without the consent of the Secretary of the Interior.

6. That the United States shall in no manner be responsible for the sums collected by said association until they have been paid into the hands of the receiver of the local land office as provided by the law, and in accordance with such regulations as may be prescribed by the Secretary of the Interior.

7. That for the purpose of enforcing said collections, the association will adopt and enforce proper bylaws, subject to the ap-
14 proval of the Secretary of the Interior, and not change them so as to in anywise impair their efficiency for said purpose, and will otherwise do any and all things it is authorized and empowered to do in the premises.

8. That the association will adopt and enforce such rules and regulations as it is authorized by its articles of incorporation and bylaws to adopt and enforce concerning the use of water by its shareholders and concerning the administration of the affairs of the association, to effectually carry out and promote the purposes of its organization, within the provisions of said articles of incorporation and bylaws, which rules and regulations shall be subject to the approval of the Secretary of the Interior, and that if the association fail to make and adopt such rules and regulations, then the Secretary of the Interior may prescribe them; but in such event the Secretary of the Interior shall impose no rule or regulation interfering with any vested right of the shareholders of the association as defined or modified by said articles of incorporation and bylaws.

9. That persons who are not now members of the association but who may be the owners or occupants of land to be irrigated, as described in its articles of incorporation or bylaws, or of added lands as therein provided for and to whom rights to the use of water from

the proposed irrigation works may be issued by the United States, may be at the designation of the Secretary of the Interior, become members of the association upon subscribing to the stock thereof and upon compliance with the other conditions for such membership.

10. That in all the relations between the United States and this association and the members of the association the rights of the members of the association to the use of water where the same have vested, are to be defined, determined, and enjoyed in accordance with the provisions of the said act of Congress and of other acts of Congress on the subject of the acquisition and enjoyment of the rights to use water, and also by the laws of the State of Washington, where not inconsistent therewith, modified, if modified at all, by the provisions of the articles of incorporation and bylaws of said association.

11. That nothing contained in this agreement, or to be implied from the fact of its execution, shall be construed, held, or deemed to be an approval by the Secretary of the Interior, nor an adoption by him of the articles of incorporation or bylaws of said association in all their details as the form of organization of water users contemplated and authorized by section 6 of the said act of Congress of June 17, 1902, but such approval and adoption is expressly reserved until the conditions prescribed in said act authorizing such approval and adoption shall have arisen; and that when the Secretary of the Interior shall make, approve, and promulgate rules and regulations for the administration of the water to be supplied from said proposed irrigation works, such rules and regulations and such modifications thereof as the Secretary may from time to time approve and promulgate, shall be deemed and held to be obligatory upon this association as fully and completely, and to every intent and purpose, as if they were now made, approved, promulgated, and written out in full in this agreement, and the same are to be so read and construed.

15 In witness whereof, the undersigned have hereunto subscribed their names and affixed their seals the day and year first herein written.

Department of the Interior:

THOS. RYAN;

Secretary of the Interior acting for and on behalf of the United States of America, party of the first part.

SUNNYSIDE WATER USERS ASSOCIATION,

By S. J. HARRISON, *President,*

Party of the second part.

Attest:

E. J. YOUNG, *Secretary,*

Sunnyside Water Users Association, Incorporated 1906, Washington.

STATE OF WASHINGTON,

County of Yakima, ss:

Be it remembered, that on this 7th day of May, 1906, before me, the undersigned, a notary public in and for said county and State,

personally appeared S. J. Harrison and E. J. Young, to me personally known to be the president and secretary, respectively, of the corporation, to wit, Sunnyside Water Users Association, that executed the within and foregoing instrument, and acknowledged the said instrument to be the free and voluntary act and deed of said corporation, for the uses and purposes therein mentioned, and on oath stated that they were authorized to execute said instrument and that the seal affixed is the corporate seal of said corporation.

In witness whereof I have hereunto set my hand and affixed my official seal the day and year first above written.

WM. B. BRIDGMAN,
Notary Public for Washington, residing at Sunnyside.

Exhibit B to bill of complaint

4–020

DEPARTMENT OF THE INTERIOR

Water-Right Application—Act June 17, 1902 (32 Stat. 388)—Yakima-Sunnyside project

U. S. Land Office, North Yakima, Washington. Serial No. 04168. Lands in private ownership.

FEBRUARY 28, 1912.
(Date)

Agnes E. Phillips & T. S. Phillips, her husband, hereinafter called the applicant, hereby applies for a water right under the ------ unit, Yakima-Sunnyside project, subject to the provisions of the act of Congress approved June 17, 1902 (32 Stat. 388), known as the "Reclamation Act", and the rules and regulations established thereunder, the water supplied in pursuance thereof to be used for the irrigation of, and to be appurtenant to, forty (40) acres of
16 irrigable land, as shown on plats approved by the Secretary of the Interior, within the area described as follows:

The southwest quarter of the southeast quarter (SW¼ SE¼), being lots 1 to 18, block 1, East Park Addition to Mabton, section 31, township 9, range 23 E., W. meridian, an area of forty (40) acres.

The quantity of water to be furnished hereunder shall be 3 acre-feet of water per annum per acre of irrigable land, as aforesaid, measured at the land; or so much thereof as shall constitute the proportionate share per acre from the water supply actually available for the lands under said project; provided, that the supply furnished shall be limited to the amount of water beneficially used on said irrigable land; provided, however, that if measuring devices are not installed at the land, an increase deemed reasonable by the reclamation service official in charge of the project shall be made for losses of water after passing the point of measurement.

The applicant hereby agrees on behalf of himself, his heirs, administrators, and assigns to pay for said water right the estimated cost

of construction as fixed by the Secretary of the Interior, namely, the sum of $52.00 per acre for forty acres of irrigable land, in not more than ten (10) annual installments, and to pay promptly when due the annual installments and the operation and maintenance charges duly assessed against said land on account of said water right, each and all of which installments and operation and maintenance charges are hereby made and shall be a lien against the above-described premises, such liens attaching immediately upon the execution hereof and being enforcible as to each and every installment, or charge, or portion thereof at such time as the same shall become due in pursuance of public notice issued by the Secretary of the Interior.

It is further agreed and provided that such lien or liens shall have the full force and effect of a mortgage or deed of trust and vest in the United States all the rights and powers which might be exercised and all benefits which might be claimed by the mortgagee in a real-estate mortgage given to secure the payment of a loan or debt, including the right of foreclosure by or on behalf of the United States in any court of competent jurisdiction, and the applicant grants to the United States or its transferee all the rights, powers, and authority in and over the above-described premises which might be exercised by the trustee named in a deed or trust given to secure the payment of a loan or debt.

The applicant further agrees and binds himself, his heirs, administrators, and assigns to pay all taxes and other liens and encumbrances which are now or may hereafter (during the life of the lien herein given to the United States) become a superior lien or encumbrance to that of the United States; and if the applicant, his administrators, executors, heirs, or assigns fail to pay any such tax, lien, or encumbrance when due, the United States may pay the same and add the amount thereof to the lien held by the United States under this agreement and recover the same.

It is further agreed that upon failure of the applicant to comply with the terms of said Reclamation Act and the regulations thereunder, this application shall be subject to cancellation by the
17 Secretary of the Interior, with the forfeiture of all rights acquired thereunder and of all payments made thereon.

This application must bear the certificate, as hereto attached, of the water users' association under this project, which has entered into contract with the Secretary of the Interior, and the liens which the United States holds against the above-described land for the payment of the building and operation and maintenance charges may be enforced, at the option of the United States, either directly by the United States or through the medium of the water users' association.

If the Secretary of the Interior has made no contract with a water users' association under this project the applicant agrees to file, upon his direction, evidence of membership in the water users' association organized under the said project, in default of which this application shall be subject to cancellation by the Secretary of the Interior, with

the forfeiture of all rights acquired thereunder and all payments made thereon.

And, being duly sworn, the applicant further deposes and says that the post-office address of the undersigned is Mabton, Washington; that the undersigned is a bona fide resident upon said land (or an occupant thereof, residing in the neighborhood, namely, upon section 31, township 9, range 23 E., W. meridian, a distance in a direct line of —miles therefrom); that the undersigned holds the following interest in the said tract: Deed, as duly shown upon the records of Yakima County, Washington; that no other application now uncanceled has been made for a water right under said act of Congress appurtenant to land now owned or claimed by the undersigned except as follows:

Application no. ------, ------ project, ------, of ------ for ------ section ------, township ------, range ------, ------ meridian, an area of ------ acres and containing ------ acres of irrigable land, as determined by the Secretary of the Interior; and that the present application is made in behalf of the undersigned and not at the instance or for the benefit of any other person or any association or corporation, either directly or indirectly. No Member of or Delegate to Congress, or Resident Commissioner, after his election or appointment or either before or after he has qualified and during his continuance in office, and no officer, agent, or employee of the Government shall be admitted to any share or part of this contract or agreement, or to any benefit to arise thereupon. Nothing, however, herein contained shall be construed to extend to any incorporated company, where such contract or agreement is made for the general benefit of such incorporation or company, as provided in section 116 of the act of Congress approved March 4, 1909 (35 Stat. 1109).

It is further understood and agreed that if the interest of the applicant in said land shall cease and said interest shall be held by a party who is not qualified to apply for or hold a water right under the provisions of the Reclamation Act, this application shall be subject to cancellation by the Secretary of the Interior, with the forfeiture of all rights acquired thereunder and of all payments made thereon.

It is further understood and agreed that the evidence of ownership of this water right shall not be issued by the United States unless fee-simple title to said land is vested in the applicant, or in a
18 qualified assignee hereof, whose aggregate water rights under the said Reclamation Act shall not exceed one hundred and sixty acres, or the maximum limit of area fixed by the Secretary of the Interior, at the time when final payment hereon is due, in default of which this application shall be subject to cancellation by the Secretary of the Interior, with the forfeiture of all rights thereunder and of all moneys paid thereon.

(Sgd.) AGNES E. PHILLIPS,
(Sgd.) T. S. PHILLIPS,
Applicant.

ACKNOWLEDGMENT

STATE OF WASHINGTON,
County of ———, *ss:*

I, G. W. Paswater, a notary public in and for the State aforesaid, do hereby certify that on this 15 day of April 1912, personally appeared before me Agnes E. Phillips & T. S. Phillips, her husband, to me known to be the individuals described in and who executed the within and foregoing instrument and acknowledged that they signed and sealed the instrument of writing as their free and voluntary act and deed for the uses and purposes therein mentioned.

In witness whereof, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

[SEAL] (Sgd.) G. W. PASWATER,
Notary Public in and for the State aforesaid, residing at Mabton.

My commission expires Dec. 28, 1913.

The above application must be signed and sealed in duplicate, acknowledged before a duly authorized officer in the manner provided by local law and duly recorded in the records of the county in which the lands are situated.

Filed in the United States land office at North Yakima, Washington, and accepted May 18, 1912, on behalf the United States.

(Date)

(Sgd.) HARRY Y. SAINT, *Register.*

If the Secretary of the Interior has entered into a contract with a water users' association under the project, the following certificate must be filled out:

———, 191__.

I hereby certify that the applicant for this water right has duly subscribed (or is the successor in interest of one who has subscribed) for the stock of this association for the lands described herein, and that all assessments levied against said stock by said association have been fully paid up to date.

[CORPORATE SEAL] ——— ———,
Secretary ——— *Water Users' Association.*

OATH OF DISINTERESTEDNESS

(Section 3745, U. S. Revised Statutes)

I do solemnly swear that the copy of contract hereunto annexed is an exact copy of contract made by me personally with Agnes E. Phillips and T. S. Phillips, her husband, that I made the same
19 fairly, without any benefit or advantage to myself, or allowing any such benefit or advantage corruptly to the said Agnes E. Phillips and T. S. Phillips, her husband, or any other person; and

that the papers accompanying include all those relating to the said contract, as required by the statute in such case made and provided.

(Sgd.) HARRY Y. SAINT,
Register.

Sworn to and subscribed before me at North Yakima, Washington, this 18th day of May 1912.

(Sgd.) A. C. STEIMAN,
Receiver.

In Supreme Court of District of Columbia

Order permitting amendment

Filed January 2, 1935

* * * * * * *

Upon consideration of the plaintiff's motion made in open court and it appearing that the defendant, through his attorney, consents ther'to, it is this 2d day of January 1935—

Ordered, adjudged, and decreed that the plaintiff be and he hereby is permitted to file an amendment to the bill of complaint heretofore filed by them in the above described cause.

JESSE C. ADKINS, *Justice.*

The foregoing order is hereby consented to this 27th day of December 1934.

J. KENNARD CHEADLE,
Attorney for Defendant.

In Supreme Court of District of Columbia

Amendment to bill of complaint

Filed January 2, 1935

* * * * * * *

Comes now the plaintiff by his attorney and having obtained leave of this court therefor, amends the bill of complaint filed by him herein, as follows:

I

At the end of paragraph XVI of the bill of complaint, add the following:

"That three acre-feet of water per acre is not now, never has been, and will not in the future be sufficient to beneficially irrigate the land belonging to the plaintiffs herein."

II

Insert the following paragraph in lieu of paragraph XIX of the complaint:

"That a maximum of three acre-feet of water per acre furnished the land of the plaintiffs would enable them to beneficially irrigate

about one-half of their said land, leaving the other one-half thereof barren and nonproductive, thereby forcing one-half of the land belonging to plaintiffs to bear the construction and maintenance charges for the whole tract of land. That if plaintiff attempted to spread a maximum of three acre-feet of water per acre over the whole tract of land belonging to them, they would not have sufficient water to grow any profitable crop and their land would be completely destroyed for farming purposes, causing them to suffer irreparable loss and damage which could not be compensated for in an action at law, and plaintiffs have no adequate or complete remedy at law and effective relief can only be administered in a court of equity."

JACOB F. OTTMULLER.

STEPHEN E. CHAFFEE.
P. C. KING, JR.
PRESTON B. KAVANAGH.

[*Duly sworn to by Jacob F. Ottmuller; jurat omitted in printing.*]

In Supreme Court of District of Columbia

Motion to dismiss

Filed February 8, 1935

* * * * * * *

Comes now Harold L. Ickes, Secretary of the Interior, the defendant in the above-entitled cause, and moves to dismiss the above-entitled cause and the plaintiff's amended bill of complaint in said cause upon each and every of the following grounds:

1. That the defendant has no individual interest in the controversy, and the relief sought against him is in his official capacity only, as a representative of the Government, which alone is to be affected by any decree herein, wherefore this suit, as manifest upon the face of the amended bill of complaint, is essentially and substantially a suit against the United States, beyond the jurisdiction of the court.

2. That the amended bill of complaint and the exhibits attached thereto and made a part thereof show that this suit is brought on contracts to which the United States is a party and that the decree prayed for would affect the interest of the United States in said contracts and the property of the United States, whereof the court is without jurisdiction.

3. That it is manifest, upon the face of the amended bill of complaint, that the plaintiff seeks, in substance and effect, a decree for specific performance by the United States of alleged obligations under its contracts, whereof the court is without jurisdiction.

4. That it appears by the amended bill of complaint that the plaintiff has a plain, adequate, and complete remedy at law, if he has any right.

21 5. That it is manifest, upon the face of the amended bill of complaint, that the relief prayed for therein would necessarily involve continued and detailed supervision by this court, for a long and indefinite period, of the performance of contract duties that require the exercise of personal judgment and technical skill, wherefore said bill lacks equity.

Wherefore, the defendant, Harold L. Ickes, Secretary of the Interior, prays that the above-entitled cause be dismissed, that the amended bill of complaint in said cause be dismissed, and that he be permitted to go hence without day, be for nothing held and recover of the plaintiff his costs.

NATHAN R. MARGOLD,
Solicitor, Department of the Interior,
CHARLES FAHY,
First Assistant Solicitor, Department of the Interior,
J. KENNARD CHEADLE,
Assistant Solicitor, Department of the Interior,
HOWARD R. STINSON,
Assistant Solicitor, Department of the Interior,
Attorneys for defendant.

Service of above motion acknowledged this 8th day of February 1935.

P. C. KING, Jr.,
Atty. for Plaintiff.

In Supreme Court of District of Columbia

Memorandum opinion

Filed April 1, 1935

* * * * * * *

In each of these cases the bill seeks to compel the defendant to carry out an executor's contract of the United States. I think that the cases of Boeing Air Transport, Inc., v. Farley, and Wells v. Roper are controlling. The defendant, as Secretary of the Interior, is in control of the irrigation project, and the effect of granting to the plaintiffs the relief sought would be to specifically enforce contracts of the United States.

The bills will be dismissed with costs.

BAILEY, *J.*

In Supreme Court of District of Columbia

Order granting motion to dismiss, &c.

Filed April 19, 1935

* * * * * * *

The above-entitled cause having come on to be heard the 29th day of March 1935 on the defendant's motion to dismiss for lack of

jurisdiction in this court to entertain said cause; and at said time the parties thereto having appeared in open court by their respective attorneys and the arguments of said attorneys having been heard, the matter having been submitted and taken under advisement by this court, and the same having been carefully considered, the court being fully advised in the premises: it is hereby,

22 Ordered, adjudged, and decreed this 19th day of April 1935 that the defendant's motion to dismiss be and the same hereby is granted, and that the bill of complaint, as amended, filed herein be, and the same hereby is, dismissed, with leave to file, within fifteen days from the date hereof, a motion for leave to amend, accompanied by the proposed amended bill of complaint.

JENNINGS BAILEY, *Justice.*

Consent as to form:
P. C. KING, Jr.,
Atty. for Plaintiff.

In Supreme Court of District of Columbia

Motion for leave to amend

Filed April 29, 1935

* * * * * * *

Now comes plaintiff, pursuant to an order heretofore entered in this cause, on the 19th day of April, dismissing the bill of complaint then on file and giving the plaintiff fifteen days to file a motion for leave to amend accompanied by the proposed amended bill of complaint, and moves the court for leave to file the proposed amended bill of complaint attached to this motion, for reasons set forth in the memorandum of points and authorities filed in support of this motion.

STEPHEN E. CHAFFEE,
PRESTON B. KAVANAGH,
PRESTON C. KING, Jr.,
Attorneys for Plaintiff.

In Supreme Court of District of Columbia

Memorandum opinion

Filed June 1, 1935

* * * * * * *

It appears from the proposed amended bills that the orders made by the defendant are not authorized by Congress, and had they been so authorized, would have deprived the plaintiffs of vested rights. The suits are not brought against the United States but to set aside unauthorized acts of the defendant in cases in which he has no discretionary powers, and is acting arbitrarily.

The motions for leave to file the amended bills will be granted.

BAILEY, *J.*

In Supreme Court of District of Columbia

Order granting motion for leave to amend, &c.

Filed June 3, 1935

* * * * * * *

The above-entitled cause having come on to be further heard on the plaintiff's motion for leave to amend, said motion having been filed pursuant to leave granted in the order of this court, entered therein the 19th day of April 1935, dismissing the bill of complaint, as amended, theretofore filed therein; and the parties thereto having appeared in open court by their respective attorneys and the
23. arguments of said attorneys on said motion having been heard, the matter having been submitted, and the court being fully advised in the premises; and having filed his opinion granting motions for leave to file amended complaint; it is hereby,

Ordered, adjudged, and decreed this 3rd day of June 1935 that the plaintiff's motion for leave to amend be and the same hereby is granted, and plaintiffs are permitted to file the proposed amended complaints.

It is further ordered that the defendant be required to further plead within the time prescribed by rules of the Court.

JENNINGS BAILEY, *Justice.*

O. K. as to form:

J. KENNARD CHEADLE,
One of Attorneys for Defendant.

In Supreme Court of District of Columbia

Amended bill

Filed June 4, 1935

* * * * * * *

To the Supreme Court of the District of Columbia, holding an equity court:

The plaintiff, by leave of the court first had and obtained, files herein his amended bill of complaint and respectfully represents:

That he is a citizen of the United States and of the State of Washington, residing near Mabton, in Yakima County, Washington, and that his post-office address is Mabton, Washington, and that he brings this suit in his own right and on his own behalf against Harold L. Ickes, a citizen of Illinois, residing in the District of Columbia, and that he complains of the matters and things hereinafter set forth.

I

That the defendant is now and has been since, to wit, March 5th, 1933, the duly appointed, qualified, and acting Secretary of the

Interior of the United States and as such has charge of the administration of the laws of the United States relating to irrigation and reclamation projects, constructed by the United States and particularly to the administration of the act of Congress, known as the "Reclamation Act", being the act of June 17th, 1902 (32 Stat. 388), as amend d and supplemented by later acts of Congress; but solely under and subject to the irrigation and appropriation laws of the State of Washington, and that said defendant is sued in his official capacity as such Secretary of the Interior as hereinafter set forth.

II

That in 1906 the then Secretary of the Interior approved an irrigation and reclamation project known as the "Sunnyside unit of the Yakima project" and on behalf of the United States purchased from the Washington Irrigation Company the Sunnyside Canal, water appropriations, and irrigation system used in connection therewith.

24

III

That the following described real estate, to wit: Southwest quarter of the southeast quarter of section 31, township 9 north, range 23 E., W. M., is situated within said Sunnyside unit of the Yakima project and also within the Sunnyside Valley Irrigation District, an irrigation district organized and existing under the laws of the State of Washington, and within Yakima County, Washington; that at the time of the purchase of said canal, water appropriations, and irrigation system said land was arid and unproductive and had no value but was susceptible to irrigation by gravity flow from said irrigation system; that said land when furnished with the amount of water necessary to beneficially irrigate said land, becomes very productive.

IV

That shortly after the purchase by the Secretary of the Interior for the United States of said canal, water appropriations, and irrigation system; and, at the time of the construction of said project was contemplated and considered by the then Secretary of the Interior, it was stated and represented by the then Secretary of the Interior, his representatives, and his subordinates, that before the construction of the reservoirs and other works could be undertaken, the owners of the land herein described and other land susceptible of irrigation by gravity flow from said system, should cooperate with the then Secretary of the Interior to the extent of incorporating the Sunnyside Water Users Association and placing their said lands in said project and agreeing to take water for the purpose of irrigating their said lands from said project; and also execute a stock-subscription contract and water-right application for the purchase of water for said land; that the owners of the land herein described

and other owners of land susceptible to irrigation by gravity flow from said irrigation system incorporated the Sunnyside Water Users Association under the laws of the State of Washington; that thereafter a contract was entered into between said corporation and the United States, a copy of which is hereto attached, and made a part hereof, marked "Exhibit A."

V

That James Rudolph Garfield was Secretary of the Interior; and as Secretary of the Interior he ascertained the total cost of purchasing said irrigation system, additional construction cost of said system, and construction of necessary storage reservoirs of sufficient capacity to furnish said land and all other land in said unit with such an amount of water as was necessary to beneficially and successfully irrigate the same; that said Secretary of the Interior ascertained and determined that the total cost of said water right for said land would be $52.00 per acre and that said sum would be sufficient to return to the reclamation fund the total cost of said project; that said Secretary of the Interior, pursuant to the terms of the Reclamation Act determined and fixed the construction charge for a water right for said land at $52.00 per acre; that said
25 secretary issued a public notice and order fixing the amount of construction charge to be paid by the owner of said land for the amount of water necessary to beneficially and successfully irrigate the same at $52.00 per acre; that said Secretary of the Interior issued a public notice and order, fixing the cost of said irrigation system at $52.00 per acre for the land herein described, a copy of which said notice and order is hereto attached, made a part hereof, and marked "Exhibit B."

VI

That before the owner of the land herein described could procure water for the irrigation of said land from the irrigation system as aforesaid, it was necessary that they make, execute, and deliver to the United States, water-right applications for water to be used in the irrigation of said land; that the then owners of the land herein described executed a water-right application, a copy of which is hereto attached, marked "Exhibit C", and made a part hereof.

VII

That the successive Secretaries of the Interior from and after the time of the issuing of said public notice and order as herein alleged, their representatives and subordinates who were charged with and who actually administered said project, uniformly and at all times construed the Reclamation Act and contracts herein referred to; that the owners of the land herein described and the owners of all other lands in said unit had purchased a sufficient amount of water to

beneficially and successfully irrigate their said land; and that the amount of water required for each tract to beneficially irrigate the same was to be determined by the representatives and subordinates of the Secretary of the Interior, who had the physical charge of the water distribution from a factual investigation made by said representatives and said subordinates by going upon the land from time to time, and from a personal examination of the same, the crops growing thereon, and the water requirements thereof. That pursuant to said practical construction made by the representatives and subordinates of the Secretary of the Interior, and in the method and manner aforesaid, it was determined by the successive Secretaries of the Interior, their representatives, and their subordinates, that 5.56 acre-feet of water per acre per annum was necessary to beneficially and successfully irrigate said land, that pursuant to said practical construction and determination the successive Secretaries of the Interior, their representatives, and their subordinates have for a period of more than twenty years delivered to said land the amount of water necessary to beneficially and successfully irrigate the same, which water has at all times been beneficially used thereon for irrigation purposes.

VIII

That the statute law of the State of Washington, Remington's Revised Statutes, section 7391, which was the law of the State of Washington at the time the water rights herein described were acquired, provides:

26 "The right to the use of water which has been applied to a beneficial use in the State shall be and remain appurtenant to the land or place upon which the same is used."

The decisions of the Supreme Court of the State of Washington uniformly hold that where water is beneficially used upon land for irrigation purposes, the water right so obtained shall be and remain appurtenant to the land where the same is used; that under and by virtue of said statute law and said decisions, the absolute title in fee simple to 5.56 acre-feet of water per acre per annum became and is now vested in the plaintiff, and under the laws of the State of Washington is real estate.

IX

That the United States completed the construction of the irrigation system in said unit and constructed reservoirs of sufficient capacity to beneficially and successfully irrigate all lands within said unit; that after all the costs of the construction of said irrigation system and the construction of reservoirs of sufficient capacity to beneficially and successfully irrigate said land had been ascertained, and after the determination had been made that 5.56 acre-feet of water per acre per annum was necessary to beneficially and successfully irrigate said land had been ascertained, and after the determination had been made that 5.56 acre-feet of water per acre per

annum was necessary to beneficially and successfully irrigate the land herein described, and after said water had been delivered for several years, Congress passed an act providing that no increase of construction charges could be made after the same has been fixed by public notice and order, except by agreement between the Secretary of the Interior and a majority of the water-right applicants; that on September 24th, 1914, the then Secretary of the Interior, Franklin K. Lane, issued a second public notice and order expressly providing that there would be no increase in the construction charges against the land herein described, a copy of said public notice is hereto attached, made a part hereof, and marked "Exhibit D."

X

The plaintiff and his predecessors in title have fully and in every particular complied with the terms of the Reclamation Act and all contracts in connection with said water right, and have fully paid to the United States the sum of $52.00 per acre in full payment of the cost of said water right for said land, and have also paid all operation and maintenance charges assessed against the same. On the 28th day of February 1934, the United States conveyed said water right to this plaintiff; that the plaintiff is now the owner and holder of the fee simple title to said water right, sufficient to beneficially and successfully irrigate said land, to wit: 5.56 acre-feet of water per acre per annum; that said water right is appurtenant to the land herein described, and the absolute fee-simple title to said land and water right is now vested in the plaintiff.

27

XI

That on or about the year 1930, Elwood Mead, Commissioner of Reclamation of the United States, wished to construct the Cle Elum Reservoir at a cost of $3,500,000.00 to store water for the purpose of irrigating lands in the Kittitas Reclamation District, the canal and distribution system in said district being in the process of construction at that time, and also for the purpose of furnishing water to irrigate lands in the Roza and Kennewick divisions of the Yakima project, the construction of which were contemplated at that time; that said Mead ascertained the total cost of said reservoir was $1,000,000.00 more than the amount that would be returned to the reclamation fund from said divisions; that it was necessary to obtain said sum from some source before construction of the Cle Elum Reservoir could be commenced; that said Mead was desirous of constructing said reservoir and knew of no other source from which to obtain said sum except from the Sunnyside unit of the Yakima project; that said Mead, without consulting this plaintiff or other water users in said unit and said district, charged the sum of $1,000,000.00 to said unit and district, and furnished the Secretary of the Interior information that provision had been made for the payment by said unit of said sum.

XII

Thereafter, B. E. Stoutemyer, district counsel, and other officials of the Bureau of Reclamation of the United States attempted to persuade the water right applicants and water users in the Sunnyside unit and in the Sunnyside Valley Irrigation District to authorize the officials of the district to execute a contract with the United States to pay $1,000,000.00 additional construction charge and obligate the plaintiff's land and all other lands in said district to the last faithful acre to pay said sum of $1,000,000.00 additional construction charges; that this plaintiff and no other water right applicants or water users in said unit or said district ever agreed to said increase of construction charges and never agreed to pay the same; that the amount so attempted to be charged against the plaintiff and other water right applicants and water users in said district was equivalent to 35% of the original cost of the water right to the plaintiffs and 35% of the original cost to all other water right applicants and water users in said district.

XIII

That on or about the 11th day of December 1930, Ray Lyman Wilbur, the then Secretary of the Interior, certified to the President of the United States that provision had been made for the repayment to the reclamation fund of the total cost of the Cle Elum Reservoir and that $1,000,000.00 of the cost of construction of said reservoir was to be obtained by rentals from the Sunnyside division of the Yakima project. A copy of this certificate is hereto attached and made a part hereof, marked "Exhibit D."

28 XIV

That thereafter said Elwood Mead and B. E. Stoutemyer agreed with Ray Lyman Wilbur, the then Secretary of the Interior, to force and coerce this plaintiff and other water-right applicants and water users in said unit and said district to authorize said district to enter into contract to pay the additional sum of $1,000,000.00 construction charge, or to force and coerce the plaintiff and other water-right applicants in said unit and said district to sign a water rental application or be deprived of a portion of the water owned by them, and in pursuance of said agreement said Mead, Stoutemyer, and Wilbur caused the Assistant Secretary of Interior to issue a public notice and order, a copy of which is hereto attached and made a part hereof, marked "Exhibit F", and also a public notice and order, a copy of which is hereto attached, made a part hereof, and marked "Exhibit G."

XV

That in pursuance of said agreement and said public notices and orders, copies of which are marked "Exhibits F and G", respec-

tively, said Mead, Stoutemyer, and Wilbur notified this plaintiff and other public-notice water-right applicants and water users in the Sunnyside unit and in said district that the plaintiff and all other public-notice water-right applicants in said unit would be deprived of all water in excess of three acre-feet per acre per annum, unless the said plaintiff and said water-right applicants signed a water-rental application in the words and figures following, to wit:

"WATER RENTAL APPLICATION

"The undersigned applicant requests excess water under public notice issued by the Secretary February 19, 1932, and agrees to pay applicable charges, with 6% interest from December 1, 1932, until paid. He further agrees that water may be withheld from his land after 1932 until such charges are paid. It is understood that advance payment for excess water will be required in 1933 if the 1932 rental charge remains unpaid at that time.

"Witness: "_____ _____,

"_____ _____ *Water user.*"

The plaintiff and all other water-right applicants refused to sign said water-rental application. In the event said public notices and orders are enforced plaintiff will be deprived of 40% of the water, the absolute title to which is vested in him.

XVI

That said Stoutemyer, Mead, and Wilbur agreed with the representatives of other divisions of the Yakima project which were under construction and to be constructed; that said Stoutemyer, Mead, and Wilbur would attempt by means of said water-rental applications to force and coerce the water-right applicants and users including the plaintiff to authorize the officials of the Sunnyside Valley Irrigation District to execute a contract and pay to the United
29 States the additional sum of $1,000,000.00 construction charges, the same being a portion of cost of constructing the Cle Elum Reservoir and which was constructed for said new divisions, and/or to collect from the plaintiff and other water-right applicants and water users in said unit by the subterfuge of the water-rental application said sum of $1,000,000.00 and that in the event said parties were unable to either force or coerce the execution of such a contract between said district and the United States and/or were unable to collect said sum of $1,000,000.00 by means of depriving the plaintiff and other water users of a portion of the water owned by them, and/or compelling the plaintiff and said water-right applicants to sign said water-rental applications and collect said sum; and in the event, said parties were unable by either of said methods to obtain the payment of the sum of $1,000,000.00, said new divisions for whose benefit said Cle Elum Reservoir was constructed would pay the same.

XVII

That three acre-feet of water per acre is not now, never has been, and will not, in the future, be sufficient to beneficially irrigate the land belonging to the plaintiff herein; that a maximum of three acre-feet of water per acre furnished to the land of the plaintiff would enable him to beneficially irrigate about one-half of said land, leaving the other half thereof barren and nonproductive, thereby forcing one-half of the land belonging to the plaintiff to bear construction, maintenance charges, taxes, and assessments on the whole tract of land. If plaintiff attempted to spread a maximum of three acre-feet per acre over the whole tract of land belonging to him, he would not have sufficient water to grow any profitable crop and his land would be completely destroyed for farming purposes, causing him to suffer irreparable loss and damage and which could not be compensated for in an action at law and plaintiff has no adequate or complete remedy at law and effective relief can only be administered in a court of equity.

XVIII

That at all times and on all other Federal reclamation projects and on the Sunnyside unit of the Yakima project prior to October 17th, 1930, which were constructed under the Reclamation Act of 1902, the successive Secretaries of Interior, their subordinates, and their representatives charged with the administration of said project have consistently and uniformly construed the Reclamation Act, contracts similar to exhibit A, and water-right applications similar to exhibit B to mean that the water-right applicant and water user had purchased, had a vested interest prior to full payment, and was the owner of the absolute title in fee simple after full payment of the purchase price for a water right of a sufficient amount of water to beneficially and successfully irrigate each tract of land in said project and that the determination as to the amount required to beneficially and successfully irrigate each tract was to be made by the representatives and subordinates of the successive Secretaries of the Interior who were charged with the distribution and that the same was to be made by said representatives and subordinates upon factual investigation obtained by personal examination of the land and crops growing thereon and water requirements thereof; and in all cases the yardstick used in determining the amount of water, to which the water applicant either had a vested interest in or owned, was beneficial use. That in the administration of the Reclamation Act under contracts similar to the contract herein referred to, no Secretary of the Interior has arbitrarily fixed the amount of water at a certain number of feet, nor taken the question of the determination of the amount of water out of the hands of his representatives and subordinates charged with the physical distribution of the water, nor fixed the maximum amount of water for

each acre in the project, regardless of the water requirements, nor required the execution of a water-rental application as a condition precedent to the use and enjoyment by the water user of a sufficient amount of water to beneficially irrigate his land, except as herein alleged in the Sunnyside unit.

XIX

That since the promulgation of said order and notice of October 17th, 1930, and the public notice order of February 19th, 1932, and since the promulgation of order requiring a water-rental application as a condition precedent to the use and enjoyment of more than three acre-feet of water per acre per annum, it has been definitely ascertained by the defendant that the Cle Elum Reservoir, actually cost $1,003,000.00 less than the estimated cost at the time said Mead charged the sum of $1,000,000.00 to the Sunnyside unit as herein alleged; that since that time the Kittitas reclamation district has entered into contract to purchase from the United States additional water at a total contract price of $2,418,000.00 and the Yakima-Benton Irrigation District, Roza unit has authorized a contract to be entered into at an additional cost over and above what was taken into consideration at the time of the certificate by the Secretary of the Interior to the President as set forth in plaintiff's exhibit H. That on account of said facts, there is no necessity for enforcing said orders and in the event the same are enforced and the Sunnyside Valley Irrigation District or the plaintiff and other water users therein pay said sum of $1,000,000.00, the United States will actually receive more than $1,000,000.00 over the entire cost of the construction of said reservoir.

XX

That the public notices, copies of which are hereto attached, marked "Exhibit E and F" issued by Ray Lyman Wilbur as Secretary of the Interior on October 17th, 1930, and February 19th, 1932, respectively, requiring the execution by the water user of a water-rental application as a condition precedent to the enjoyment and use by the plaintiff of any water in excess of three acre-feet, were not made and issued in good faith or by the exercise of an honest judgment for the reasons herein alleged and set forth,
31 but were arbitrarily and capriciously made and the defendant is arbitrarily and capriciously enforcing the same for the express purpose of coercing and forcing this plaintiff and other water-right applicants and water users in said unit and in said district to authorize said district to enter into contract to pay the United States the sum of $1,000,000.00 construction charge, a part of the cost of constructing the Cle Elum Reservoir, and obligating the last faithful acre of land in said district and the plaintiff's land to pay said sum

and/or to force and coerce the plaintiff and other water-right applicants and water users in said unit and district to execute water-rental applications so that this plaintiff and said water-right applicants and water users will be required to pay to the United States said sum of $1,000,000.00.

XXI

That for the reasons herein alleged and set forth said public notice and order of October 17th, 1930, and said public notice and order of February 19th, 1932, copies of which are hereto attached, marked "Exhibit F and G", and all orders and notices requiring the execution of a water-rental application as a condition precedent to use and enjoyment of more than three acre-feet per acre per annum are null and void and of no effect whatsoever for the reason that the same are in excess of the power and authority vested in the Secretary of the Interior and the enforcement of said public notice and orders are in excess of the authority vested in the defendant; that if said defendant enforces said public notices and orders the plaintiff will be deprived of the use of about 40% of the water right, the absolute title to which is vested in plaintiff pursuant to the terms of the Reclamation Act, contracts, and laws of the State of Washington, without any hearing, and in positive violation of the Constitution and laws of the United States and also in positive violation of the constitution and laws of the State of Washington.

XXII

That the defendant started the enforcement of said public notice and order of October 17th and February 19th, 1932, and the orders requiring a water-rental application to be signed as a condition precedent to the use and enjoyment by the plaintiff in excess of three acre-feet, during the irrigation season of 1934, and the plaintiff is advised and believes and therefore alleges that said defendant, unless he is restrained by an order of this court, will enforce said orders and public notices during the present irrigation season; that said defendant has refused to give any heed to a joint memorial of the State Legislature of the State of Washington in connection with said public notices and orders and has also refused plaintiff and other water-right applicants and water users a right to be heard, and said defendant has wholly refused to consider plaintiff's ownership of said water right and takes the position that there is nothing that the plaintiff can do and that said defendant can arbitrarily and capriciously enforce said public notices and orders and thus compel submission of said water-right applicants and the other
32 water users in said unit and district and collect the sum of $1,000,000 to pay a part of the cost of the construction of the

Cle Elum Reservoir; that there is no other forum or court that has jurisdiction to give this plaintiff any relief against the unlawful acts of said defendants, and if defendant is permitted to enforce said notices and orders the plaintiff's farm will be destroyed for farming purposes and the plaintiff will be driven therefrom and will lose the savings of an entire lifetime.

Wherefore the plaintiff prays:

1. That the defendant, Harold L. Ickes, Secretary of the Interior, be required to appear and make answer to the foregoing amended bill of complaint, but not under oath, answer under oath being hereby expressly waived.

2. That upon the filing of this amended bill or at such time thereafter as shall be fixed by the court, an order be issued herein pendente lite requiring the defendant, as Secretary of the Interior, to suspend the enforcement of the public notice and order, a copy of which is hereto attached, marked "Exhibit F", and to suspend the enforcement of the public notice and order, a copy of which is hereto attached, marked "Exhibit G", promulgated by his predecessor, Ray Lyman Wilbur, and also all notices and orders requiring the execution of a water-rental application as a condition precedent to enjoying the use of more than three acre-feet of water per acre per annum, and restoring to the plaintiff his rights and privileges that he enjoyed prior to the promulgation of said notices and orders, and that upon the hearing of this action an order be entered requiring the defendant, as Secretary of the Interior, to vacate, set aside, and hold for naught the said notices and orders herein referred to, and that the plaintiff be restored to the rights and privileges which he enjoyed prior to the promulgation of said notices and orders.

3. For such other and further relief as shall be just and equitable in the premises.

STEPHEN E. CHAFFEE,
Attorney for the Plaintiff.
PRESTON B. KAVANAGH,
PRESTON C. KING, JR.,
Attorneys for Plaintiff.

[*Duly sworn to by Jacob F. Ottmuller; jurat omitted in printing.*]

NOTE.—Exhibit A, hereto attached, is same as exhibit A attached to original bill of complaint.

33 *Exhibit B to amended complaint*

PUBLIC NOTICES AND ORDERS, SUNNYSIDE PROJECT, WASHINGTON

DEPARTMENT OF THE INTERIOR,
Washington, March 2, 1909.

In pursuance of the provisions of section 4 of the Reclamation Act of June 17, 1902 (32 Stat. 388), notice is hereby given as follows:

Water will be furnished from the Sunnyside project, Washington, under the provisions of the Reclamation Act, for the irrigable land shown on the following township plats—

Willamette meridian:

T. 11 N., R. 20 E.
T. 11 N., R. 21 E.
T. 10 N., R. 21 E.
T. 10 N., R. 22 E.
T. 10 N., R. 23 E.
T. 9 N., R. 22 E.
T. 9 N., R. 23 E.
T. 8 N., R. 24 E.
T. 9 N., R. 24 E.

approved March 2, 1909, by the Secretary of the Interior, and on file in the local land office at North Yakima, Washington.

Water will be furnished in the irrigation season of 1909 for that portion of the land shown upon a list on file in the local land office, the same having heretofore received water from the said Sunnyside project and now being in cultivation.

Water will be furnished for the remaining portions of the irrigable land shown on said plants, from time to time, as announcement shall be made that water is available,

Water-right applications may be made for the irrigable areas shown on the said plats. The time when payments will be due therefor is herein after stated.

The charges which shall be made per acre of irrigable land which can be irrigated by the waters from said irrigation project are in two parts, as follows:

1. The building of the irrigation system $52 per acre of irrigable land, payable in not more than ten annual instalments, each payment not less than $5.20 per acre or some multiple thereof; provided, however, that full payment may be made at any time of any balance remaining due, after certification has been made by the Commissioner of the General Land Office that full and satisfactory compliance has been shown with all the requirements of the law as to residence, cultivation, and reclamation.

2. For operation and maintenance, which will, as soon as the data are available, be fixed in proportion to the amount of water used, with a minimum charge per acre of irrigable land whether water is used thereon or not. The operation and maintenance charge for the irrigation season of 1909, and until further notice, will be 95 cents per acre of irrigable land, for which water is ready in the irrigation season of 1909, whether water is used thereon or not.

The first instalment on account of said charges for the irrigable lands shown on the list on file in the local land office to receive
34 water in the irrigation season of 1909 shall be due March 15, 1909. The second instalment shall be due March 1, 1910. Subsequent instalments shall be due on March 1 of each year thereafter

until fully paid. All charges are payable at the local land office, North Yakima, Washington.

The first instalment of the charges for the irrigable land, for which water is to be subsequently furnished, will be due on March 1 of the year in which water shall be available for said lands, and subsequent instalments shall be due on March 1 of each year thereafter until fully paid.

The first instalment of charges for all lands shown on the said list, for which it is hereby announced that water will be available in the season of 1909, whether or not water-right application is made therefor, or water is used thereon, shall be due and payable as herein provided.

The regulation is hereby established that no water will be furnished in any year until all operation and maintenance charges levied for that year shall have been paid in full. Accordingly no water will be furnished during the irrigation season of 1909 for any lands until the portion of the instalment for operation and maintenance due on March 15, 1909, has been paid, and no water will be furnished in any subsequent irrigation season until the payment has been made of the portion of the instalment for operation and maintenance due March 1 of said year.

Failure to make any two payments of the instalments of charges when due shall render the application subject to cancellation, with forfeiture of all rights under the application, as well as of any moneys already paid thereon.

The charges herein provided for may, for the convenience of the applicants, be paid to the special fiscal agent of the U. S. Reclamation Service, assigned to the Sunnyside project, for transmission to the register and receiver of the local land office, provided the necessary charges for transportation of the cash, as determined by the special fiscal agent, accompany the payment of the water-right charges.

JAMES RUDOLPH GARFIELD,
Secretary of the Interior.

Exhibit C to amended complaint

4–020

DEPARTMENT OF THE INTERIOR

Water-Right Application—Act June 17, 1902 (32 Stat. 388)—
Yakima-Sunnyside Project

U. S. Land office, North Yakima, Washington. Serial No. 04168.
Lands in private ownership.

FEBRUARY 28, 1912.
(Date)

Agnes E. Phillips & T. S. Phillips, her husband, hereinafter called the applicant, hereby applied for a water right under the ——— unit, Yakima-Sunnyside project, subject to the provisions of the act of Congress approved June 17, 1902 (32 Stat. 388),
35

known as the "Reclamation Act" and the rules and regulations established thereunder, the water supplied in pursuance thereof to be used for the irrigation of, and to be appurtenant to, forty (40) acres of irirgable land, as shown on plats approved by the Secretary of the Interior, within the area described as follows: The southwest quarter of the southeast quarter (SW¼ SE¼) being lots 1 to 18, block 1, East Park Addition to Mabton, section 31, township 9, range 23 E., W. meridian, an area of forty (40) acres.

The quantity of water to be furnished hereunder shall be 3 acre-feet of water per annum per acre of irrigable land, as aforesaid, measured at the land; or so much thereof as shall constitute the proportionate share per acre from the water supply actually available for the lands under said project; provided, that the supply furnished shall be limited to the amount of water beneficially used on said irrigable land; provided, however, that if measuring devices are not installed at the land, an increased deemed reasonable by the Reclamation Service official in charge of the project shall be made for losses of water after passing the point of measurement.

The applicant hereby agrees on behalf of himself, his heirs, administrators, and assigns to pay for said water right the estimated cost of construction as fixed by the Secretary of the Interior, namely, the sum of $52.00 per acre for forty acres of irrigable land, in not more than ten (10) annual installments, and to pay promptly when due the annual installments and the operation and maintenance charges duly assessed against said land on account of said water right, each and all of which installments and operation and maintenance charges are hereby made and shall be a lien against the above-described premises, such liens attaching immediately upon the execution hereof and being enforcible as to each and every installments, or charge, or portion thereof at such time as the same shall become due in pursuance of public notice issued by the Secretary of the Interior.

It is further agreed and provided that such lien or liens shall have the full force and effect of a mortgage or deed of trust and vest in the United States all the rights and powers which might be exercised and all benefits which might be claimed by the mortgagee in a real-estate mortgage given to secure payment of a loan or debt, including the right of foreclosure by or on behalf of the United States in any court of competent jurisdiction; and the applicant grants to the United States or its transferee all the rights, powers, and authority in and over the above-described premises which might be exercised by the trustee named in a deed or trust given to secure the payment of a loan or debt.

The applicant further agrees and binds himself, his heirs, administrators, and assigns to pay all taxes and other liens and encumbrances which are now or may hereafter (during the life of the lien herein given to the United States) become a superior lien or encumbrance to that of the United States, and if the applicant, his administrators, executors, heirs, or assigns fail to pay any such tax,

lien, or encumbrance when due, the United States may pay the same and add the amount thereof to the lien held by the United States under this agreement and recover the same.

36 It is further agreed that upon failure of the applicant to comply with the terms of said Reclamation Act and the regulations thereunder, this application shall be subject to cancellation by the Secretary of the Interior, with the forfeiture of all rights acquired thereunder and of all payments made thereon.

This application must bear the certificate, as hereto attached, of the water users' association under this project, which has entered into contract with the Secretary of the Interior, and the liens which the United States holds against the above-described land for the payment of the building and operation and maintenance charges, may be enforced, at the option of the United States, either directly by the United States or through the medium of the water users' association.

If the Secretary of the Interior has made no contract with a water users' association under this project, the applicant agrees to file, upon his direction, evidence of membership in the water users' association organized under the said project; in default of which this application shall be subject to cancellation by the Secretary of the Interior, with the forfeiture of all rights acquired thereunder and of all payments made thereon.

And, being duly sworn, the applicant further deposes and says that the post-office address of the undersigned is Mabton, Washington; that the undersigned is a bona fide resident upon said land (or an occupant thereof, residing in the neighborhood, namely, upon section 31, township 9, range 23 E., W. meridian, a distance in a direct line of ------ miles therefrom); that the undersigned holds the following interest in the said tract: Deed as duly shown upon the records of Yakima County, Washington; that no other application, now uncanceled, has been made for a water right under said act of Congress, appurtenant to land now owned or claimed by the undersigned, except as follows: Application no. ------, ------ project, ------, of ------ for ------, section ------, township ------, range ------, ------ meridian, an area of ------ acres and containing ------ acres of irrigable land, as determined by the Secretary of the Interior; and that the present application is made in behalf of the undersigned and not at the instance or for the benefit of any other person or any association or corporation, either directly or indirectly. No Member of or Delegate to Congress, or resident commissioners, after his election or appointment or either before or after he has qualified and during his continuance in office, and no officer, agent, or employee of the Government shall be admitted to any share or part of this contract or agreement, or to any benefit to arise thereupon. Nothing however herein contained shall be construed to extend to any incorporated company, where such contract or agreement is made for the general benefit of such incorporation or company, as provided in

section 116 of the act of Congress approved March 4, 1909 (35 Stat. 1109).

It is further understood and agreed that if the interest of the applicant in said land shall cease and said interest shall be held by a party who is not qualified to apply for or hold a water right under the provisions of the Reclamation Act, this application shall be subject to cancellation by the Secretary of the Interior, with the forfeiture of all rights acquired thereunder and of all payments made thereon.

37 It is further understood and agreed that the evidence or ownership of this water right shall not be issued by the United States unless fee-simple title to said land is vested in the applicant, or in a qualified assignee thereof, whose aggregate water rights under the said Reclamation Act shall not exceed one hundred and sixty acres, or the maximum limit of area fixed by the Secretary of the Interior, at the time when final payment hereon is due, in default of which this application shall be subject to cancellation by the Secretary of the Interior, with the forfeiture of all rights thereunder and of all moneys paid thereon.

(Sgd.) AGNES E. PHILLIPS,
(Sgd.) T. S. PHILLIPS,
Applicant.

ACKNOWLEDGMENT

STATE OF WASHINGTON,
County of ———:

I, G. W. Paswater, a notary public in and for the State aforesaid, do hereby certify that on this 15 day of April 1912 personally appeared before me Agnes E. Phillips & T. S. Phillips, her husband, to me known to be the individuals described in and who executed the within and foregoing instrument and acknowledged that they signed and sealed the instrument of writing as their free and voluntary act and deed for the uses and purposes therein mentioned.

In witness whereof, I have hereunto set my hand, affixed my official seal, the day and year in this certificate first above written.

[SEAL] (Sgd.) G. W. PASWATER,
Notary Public in and for State aforesaid, residing at Mabton.

My commission expires Dec. 28, 1913.

The above application must be signed and sealed in duplicate, acknowledged before a duly authorized officer in the manner provided by local law, and duly recorded in the records of the county in which the lands are situated.

Filed in the United States land office at North Yakima, Washington, and accepted May 18, 1912, on behalf of the United States.

(Sgd.) HARRY Y. SAINT, *Register.*

If the Secretary of the Interior has entered into a contract with a water users' association under the project, the following certificate must be filled out:

----------, 191__.

I hereby certify that the applicant for this water right has duly subscribed (or is the successor in interest of one who has subscribed) for the stock of this association for the lands described herein, and that all assessments levied against said stock by said association have been fully paid up to date.

[CORPORATE SEAL] _____ _____,

Secretary _____ Water Users' Association.

38 OATH OF DISINTERESTEDNESS

(Section 3745, U. S. Revised Statutes)

I do solemnly swear that the copy of contract hereunto annexed is an exact copy of contract made by me personally with Agnes E. Phillips and T. S. Phillips, her husband, that I made the same fairly, without any benefit or advantage to myself, or allowing any such benefit or advantage corruptly to the said Agnes E. Phillips and T. S. Phillips, her husband, or any other person; and that the papers accompanying include all those relating to the said contract, as required by the statute in such case made and provided.

(Sgd.) HARRY Y. SAINT, *Register.*

Sworn to and subscribed before me at North Yakima, Washington, this 18th day of May 1912.

(Sgd.) A. C. STEINMAN, *Receiver.*

Exhibit D to amended complaint

GENERAL PUBLIC NOTICE FOR ALL RECLAMATION PROJECTS

DEPARTMENT OF THE INTERIOR,
Washington, September 24, 1914.

1. In pursuance of the provisions of the Reclamation Extension Act of August 13, 1914 (Public, No. 170), notice is hereby given that the charges for a water right for lands under the several projects and units thereof for which public notice or notices have heretofore issued are of two kinds: (1) A charge per irrigable acre for the building of the irrigation system termed as construction charge; (2) an annual charge for each acre-foot of water delivered, payable at such time as may hereafter be fixed, for the operation and maintenance of the project or a unit thereof. Each acre of irrigable land, whether irrigated or not, will be charged with a minimum operation

and maintenance charge based upon the charges for delivery of not less than one acre-foot of water.

2. The amount of the construction charge per irrigable acre for lands for which entry under the provisions of the Reclamation Act of June 17, 1902 (32 Stat. 388), or water-right application has heretofore been made, shall be the amount fixed in the several public notices heretofore issued for the respective lands and therein termed "the building charge", and will not be increased, except as provided in said Reclamation Extension Act.

3. Any person whose land or entry has heretofore become subject to the terms and conditions of the reclamation law may secure the benefits of the extension of the period of payments, provided for in the said Reclamation Extension Act, by notifying the Secretary of the Interior of his acceptance of all the terms and conditions of said act. Such notice of acceptance shall be in the form prescribed by the Secretary, and may be obtained from the project manager on application. Such acceptance must be filed with the project manager within six (6) months from the date of this public notice. The construction charge, for the lands or entries of persons so accepting the benefits of the period of extension, or so much thereof as may
39 remain unpaid at the time of the filing said notice of acceptance, must be paid in not more than twenty (20) annual instalments; the first of which instalments will be due December 1, 1914. The first four of such annual instalments shall be each two (2) per centum and the next two instalments each four (4) per centum and the remaining fourteen instalments each six (6) per centum of the said construction charge, or of the portion thereof remaining unpaid at the time of filing said notice of acceptance as the case may be. The whole or any part of the construction charge may be paid within any shorter period than 20 years if so desired.

4. The method of determining the annual operation and maintenance charge, the penalties for failure to pay the construction charges and the operation and maintenance charges when due, the reclamation requirements, and the discount allowed for prepayment of the operation and maintenance charges are prescribed by the said Reclamation Extension Act.

FRANKLIN K. LANE,
Secretary of the Interior.

Exhibit E to amended complaint

DECEMBER 11, 1930.

MY DEAR MR. PRESIDENT:

The acts of Congress of March 7, 1928 (45 Stat. 200, 228, and of March 4, 1929, 45 Stat. 1562, 1592), make appropriations of $500,000 and $1,000,000, respectively, for the construction of Cle Elum Dam, Yakima project. By act of May 14, 1930, 46 Stat. 279, 308, the

unexpended balances of these appropriations were made available during the fiscal year 1931.

Section 4 of the act of June 25, 1910, provides, in effect, that after the date of that act no irrigation project to be constructed under the act of June 17, 1902, 32 Stat. 388, and amandatory acts shall be undertaken until the project shall have been recommended by the Secretary of the Interior and approved by the direct order of the President.

Subsection B, section 4, of the act of December 5, 1924 (43 Stat. 702), provides as follows:

"That no new project or new division of a project shall be approved for construction or estimates submitted therefor by the Secretary until information in detail shall be secured by him concerning the water supply, the engineering features, the cost of construction, land prices, and the probable cost of development, and he shall have made a finding in writing that it is feasible, that it is adaptable for actual settlement and farm homes, and that it will probably return the cost thereof to the United States."

As the sixth and last of a series of dams for regulating and storing the waters of the Yakima River and tributaries, it is proposed to construct on earth- and gravel-fill storage dam located on the Cle Elum River, a tributary of the Yakima River. This dam is to have a maximum height of about 125 feet, a crest length of 700 feet, and a volume of about 450,000 cubic yards of material, forming a reservoir with an area of 4,680 acres for storage of 435,000 acre-feet of water for the irrigation of lands under the Yakima project. The cost of the storage dam is estimated at $2,800,000, of the reservoir right-of-way $300,000, and the flowage rights and contingencies $400,000, making the total estimated cost $3,500,000. This constitutes a part of the storage system of the project, the total actual and estimated cost of which is $11,558,000. Of this amount the return of $6,996,000 is guaranteed under existing contracts, leaving a balance of $4,562,000, the repayment of which will be provided for as follows: Five hundred eighty thousand dollars is to be repaid by the Wapato Indian Reservation, $1,000,000 by rentals from the Sunnyside division of the Yakima project, and the remainder by the Roza and Kennewick divisions of the project.

The development is believed to be feasible, the project is adaptable for actual settlement and farm homes, and the cost of construction of the dam will in all probability be returned to the United States.

It is recommended that this work be approved, and that the necessary authority be issued to this Department to make contracts for the construction of the dam and to proceed with the work.

Very truly yours,

(Signed) RAY LYMAN WILBUR.

Exhibit F to amended complaint

OCTOBER 17, 1930.

NOTICE AND RULES AND REGULATIONS AS TO WATER DELIVERIES IN THE SUNNYSIDE VALLEY IRRIGATION DISTRICT FOR THE YEAR 1931 AND SUBSEQUENT YEARS AND DETERMINATION OF AMOUNT OF WATER REQUIRED

The water applications and water-right contracts which determine the limit of the individual water rights in the Sunnyside Valley Irrigation District provide in most cases—

(A) For the delivery of three (3) acre-feet of water or so much thereof as is necessary for beneficial use in years of ordinary run-off in Yakima River, with a provision for a pro rata reduction in years of unusual drought or low water.

(B) Some of such application or contracts provide for delivery of 3 acre-feet subject to a proviso, "that the amount of water furnished shall be limited to the amount beneficially used upon said lands."

(C) Still other applications or contracts provide for delivery of 3 acre-feet per annum per acre, "or as much more water as will be required to successfully irrigate the land, the amount so required to be determined by the authorized agent of the United States" and subject to the proviso "that the amount of water furnished shall be limited to the amount beneficially used upon such lands" and the further provision "that the United States shall not be responsible for the failure to supply water under this contract caused by insufficient supply of water in Yakima River due to hostile diversion or unusual drought."

The amount of water required to grow a successful crop depends largely upon the amount of labor and money expended in preparing the land, providing equipment for economical use of water and caring for the water to avoid waste. Cheap storage sites are available on the Yakima River, particularly at Lake Cle Elum, and
41 it may be cheaper to provide additional storage than to provide the necessary labor and equipment to secure an economical use of water. If the purchase of additional storage is preferred to strict economy in the use of the existing water supply, the opportunity is available to provide additional storage by participation in the construction of another reservoir.

Owing to the fact that the canal system of the Kittitas division of the Yakima project has not heretofore been completed and the lands of that division have not heretofore been ready to use the stored water to which they are entitled, it has been possible to allow the water users of the Sunnyside Valley Irrigation District the temporary use of water in excess of the amounts specified in their respective contracts and water applications, but the Kittitas division is now beginning the use of the water to which it is entitled under the contract between the Kittitas Reclamation District and the United States, and it has now become necessary to limit water deliveries in the

Sunnyside Valley Irrigation District to the amounts specified in the contracts and water applications applicable to the lands of that district.

In order that all water users in the Sunnyside Valley Irrigation District may know in advance that economy in the use of water will hereafter be necessary, and be prepared to take care of the water and use it to the best advantage, notice is hereby given that as to all lands except those above referred to in paragraph (C), during the year 1931 and subsequent years, until further notice, water deliveries in that district will be limited to three (3) acre-feet per irrigable acre per year as specified in the said contracts and applications, except in years of unusual drought or low water when it will be necessary to limit deliveries to a somewhat smaller amount as provided for in said contracts applicable to the lands of the district; provided, however, that so long as there is surplus stored water available not required to meet the contract obligations of the United States to other parties, water in excess of three acre-feet may be rented by water users of the Sunnyside Valley Irrigation District of the classes referred to above as "A" and "B" whose rights are limited under their applications and contracts to 3 acre-feet. The water rental charge for such extra water in excess of 3 acre-feet, used during the irrigation season of 1931, will be one dollar and fifty cents ($1.50) per acre-foot, and the rental rate will be announced annually for subsequent seasons. All money collected for the rental of such extra water will be applied toward the payment of the unsecured portion of the construction costs of the reservoir system of the Yakima project.

The determination "by the authorized agent of the United States" of the amount of water required "to successfully irrigate" the lands subject to the above quoted clause referred to in paragraph C will be made during the year 1931 and deliveries to such lands in 1932 and subsequent years will be governed by such determination except in years of unusual drought or low water when it will be necessary to limit deliveries to a somewhat smaller amount as provided for in said contracts applicable to such lands.

(Signed) JOHN H. EDWARDS,
Assistant Secretary of the Interior.

42 *Exhibit G to amended complaint*

60865 (No. 31)

United States Department of the Interior, Bureau of Reclamation, Sunnyside Division, Yakima Project

PUBLIC NOTICE OF ANNUAL OPERATION AND MAINTENANCE CHARGES

(Act of June 17, 1902, 32 Stat. 388, as amended or supplemented)

WASHINGTON, D. C., *February 19, 1932.*

1. Operation and maintenance charges for project lands.—For the purpose of equitably determining operation and maintenance charges

for the lands of the Sunnyside division, Yakima project, Washington, notice is hereby given that for the irrigation season of 1932, and thereafter until further notice, each acre of irrigable land subject to public notice rates in said division, whether water is used or not, shall be charged with a minimum operation and maintenance charge of one dollar and fifty cents ($1.50), which will permit delivery of not more than the amounts per irrigable acre to which such lands are entitled under notice and regulations of the Secretary, dated October 17, 1930, and in accordance with the following schedule per irrigable acre:

Monthly schedule of deliveries:

April	13.3 percent.
May	15.0 "
June	18.3 "
July	18.3 "
August	16.7 "
September	11.7 "
October	6.7 "

The above deliveries will be contingent on beneficial use, as determined by the project superintendent.

2. Charges for water rental for lands subject to public notice.—The lands of the Sunnyside division, Yakima project, Washington, under public notice, have been divided by the Sunnyside Valley Irrigation District into three classes, according to water requirements, namely, (a), (b), and (c), and a map showing such classification is on file in the office of the project superintendent and in the office of the irrigation district. For additional water (if available from either storage or natural flow) delivered during the months of June, July, and August in excess of the monthly schedule of the preceding paragraph, the rental charge, as provided in notice of October 17, 1930, will be as follows:

Class A—$1.50 per acre-foot.
Class B— .75 per acre-foot.
Class C— .50 per acre-foot.

When available, water in excess of this schedule will be delivered during the other months of the season without extra charge.

3. Charges for rental water for lands under supplemental water-right contracts.—For lands receiving water under said division
43 of said project, by virtue of certain supplemental water-right contracts with the United States, under the provisions of which a minimum operation and maintenance charge is fixed which permits the delivery of amounts of water, determined in accordance with the public notice of October 17, 1930, a rental charge of one and 50/100 dollars ($1.50) per acre-foot for additional water (if available from storage or natural flow) delivered during each of the months of June, July, and August in excess of the said determined amounts will be made. When available, water in excess of the determined amounts will be delivered during the other months of the season without extra charge.

4. Water-rental charges for lands outside the project.—For water which may be furnished lands outside the limits of the said division of said project the charge shall be one dollar ($1.00) per acre-foot for the irrigation season of 1932, and thereafter until further notice.

5. Water rights secured with lands, the title to which has passed to the several irrigation districts and the farming of which is now abandoned, may be used upon types or classes of land specified by the irrigation districts, under approved rules and regulations, where the same is not now covered by district contract, such designation to be made within thirty (30) days after date of this public notice.

6. Time of payment.—All water charges announced herein are due and payable on December 31, following the irrigation season.

Jos. M. Dixon,
First Assistant Secretary.

In Supreme Court of District of Columbia

Motion to dismiss

Filed June 7, 1935

* * * * * * *

Comes now Harold L. Ickes, Secretary of the Interior, the defendant in the above-entitled cause, and moves to dismiss the above-entitled cause and the plaintiff's amended bill of complaint in said cause upon each and every of the following grounds:

1. That the defendant has no individual interest in the controversy, and the relief sought against him is in his official capacity only, as a representative of the Government, which alone is to be affected by any decree herein, wherefore this suit, as manifest upon the face of the amended bill of complaint, is essentially and substantially a suit against the United States, beyond the jurisdiction of the court.

2. That the amended bill of complaint and the exhibits attached thereto and made a part thereof show that this suit is brought on contracts to which the United States is a party and that the decree prayed for would affect the interest of the United States in said contracts and the property of the United States, whereof the court is without jurisdiction.

3. That it is manifest, upon the face of the amended bill of complaint, that the plaintiff seeks, in substance and effect, a decree for specific performance by the United States of alleged obligations under its contracts, whereof the court is without jurisdiction.

44 4. That it appears by the amended bill of complaint that the plaintiff has a plain, adequate, and complete remedy at law, if he has any right.

5. That it is manifest, upon the face of the amended bill of complaint, that the relief prayed for therein would necessarily involve continued and detailed supervision by this court, for a long and in-

definite period, of the performance of contract duties that require the exercise of personal judgment and technical skill, wherefore said bill lacks equity.

Wherefore, the defendant, Harold L. Ickes, Secretary of the Interior, prays that the above-entitled cause be dismissed, that the amended bill of complaint in said cause be dismissed, and that he be permitted to go hence without day, be for nothing held and recover of the plaintiff his costs.

NATHAN R. MARGOLD,
Solicitor, Department of the Interior,
J. KENNARD CHEADLE,
Assistant Solicitor, Department of the Interior,
HOWARD R. STINSON,
Assistant Solicitor, Department of the Interior,
Attorneys for Defendant.

Service accepted and copy received June 7th, 1935.

STEPHEN E. CHAFFEE,
One of Attys. for Plff.

In Supreme Court of District of Columbia

Memorandum opinion

Filed June 14, 1935

* * * * * * *

In sustaining the motions in these cases for leave to file the amended bills accompanying the motions I necessarily considered the questions raised by the motions to dismiss.

My opinion has not been changed by the argument and briefs in behalf of the motions, and the motions to dismiss will be overruled, with leave to the defendant to answer within thirty days.

BAILEY, *J.*

In Supreme Court of District of Columbia

Order denying motion to dismiss amended bill of complaint

Filed June 24, 1935

* * * * * * *

The above-entitled cause coming on to be further heard on defendant's motion to dismiss the amended bill of complaint herein, and the parties thereto having appeared in open court by their respective attorneys, and the arguments of said attorneys on said motion having been heard, the matter having been submitted, and the court being fully advised in the premises, and having denied said motion to dismiss; it is hereby

Ordered, adjudged, and decreed this 24th day of June 1935 that the defendant's motion to dismiss plaintiff's amended bill of com-
45 plaint be, and the same is hereby, denied, with leave to the defendant to answer within thirty days.

JENNINGS BAILEY, *Justice.*

From the foregoing order the defendant, by his attorney of record in open court, notes a petition to the United States Court of Appeals for the District of Columbia for the allowance of a special appeal; whereupon it is hereby further ordered that further proceedings in this cause be stayed pending disposition of the aforesaid petition for a special appeal; and if said petition be granted, then pending disposition of the special appeal. If said petition or said special appeal be finally decided adversely to the defendant herein, the defendant shall have leave to answer within thirty days from such final decision.

JENNINGS BAILEY, *Justice.*

Acceptable as to form: No objection:

PRESTON B. KAVANAGH,
One of Attorneys for Plaintiff.

In United States Court of Appeals for the District of Columbia

[Title omitted.]

Order allowing special appeal

Filed July 23, 1935

On consideration of the petition for the allowance of a special appeal in the above entitled cause from the order of the Supreme Court of the District of Columbia entered therein on June 24, 1935, by Mr. Justice Jennings Bailey,

It is ordered by the court that the petition be and it is hereby granted and a special appeal allowed as prayed.

Per Mr. Chief Justice MARTIN.

JULY 22, 1935.
A true copy.
Test:
[SEAL]

HENRY W. HODGES, *Clerk.*
By MONCURE BURKE, *Deputy clerk.*

46 In Supreme Court of District of Columbia

Assignment of errors

Filed July 26, 1935

* * * * * * *

Now comes the defendant, Harold L. Ickes, Secretary of the Interior, by his attorneys, and assigns as errors of the Supreme Court of the District of Columbia in the above-entitled cause the following:

1. The court erred in denying defendant's motion to dismiss the amended bill of complaint.,

2. The court erred in signing and entering the order denying the motion to dismiss the amended bill of complaint.

3. The court erred in holding that the suit of plaintiff was not brought against the United States.

4. The court erred in not granting the motion to dismiss the amended bill of complaint and in not dismissing the amended bill of complaint for lack of jurisdiction.

5. The court erred in not holding that the defendant has no individual interest in the controversy and that the relief sought against him is in his official capacity only, as an officer of the United States, which alone is to be affected by any decree herein, wherefore the suit, as manifest upon the face of the amended bill of complaint, is essentially and substantially a suit against the United States, beyond the jurisdiction of the court.

6. The court erred in not holding that the amended bill of complaint and the exhibits attached thereto and made a part thereof show that the suit is brought on contracts to which the United States is a party and that the decree prayed for would effect the interests of the United States in said contracts and the property of the United States, wherefore the court is without jurisdiction.

7. The court erred in not holding that the amended bill of complaint prays, in substance and effect, for a decree for specific performance by the United States of alleged obligations under its contracts, whereof the court is without jurisdiction.

8. The court erred in not holding that it appears by the amended bill of complaint that the plaintiff has a plain, adequate, and complete remedy at law, if he has any right.

9. The court erred in not holding that the relief prayed for in the amended bill of complaint would necessarily involve continued and detailed supervision by this court, for a long and indefinite period, of the performance of contract duties that require the exercise of personal judgment and technical skill, wherefore said bill lacks equity.

NATHAN R. MARGOLD,
Solicitor, Department of the Interior,
FREDERICK BERNAYS WIENER,
Assistant Solicitor, Department of the Interior,
JACKSON E. PRICE,
Assistant Solicitor, Department of the Interior,
Attorneys for the Defendant.

47 Service of a copy of the above assignment of errors acknowledged this 26th day of July 1935.

PRESTON B. KAVANAGH,
One of the Attorneys for the Plaintiff.

Memorandum

August 13, 1935

Time to file transcript of record in Court of Appeals extended to September 16, 1935.

In Supreme Court of District of Columbia

Designation of record

Filed July 26, 1935

* * * * * * *

The court will please prepare a transcript of the record in the above-entitled cause and include therein the following:

1. Bill of complaint.
2. Order of the court permitting amendment to the bill of complaint.
3. Amendment to bill of complaint.
4. Motion to dismiss bill of complaint, as amended.
5. Memorandum opinion of Mr. Justice Bailey granting motion to dismiss bill of complaint, as amended.
6. Order of the court granting motion to dismiss and dismissing bill of complaint, as amended.
7. Motion for leave to amend.
8. Memorandum opinion of Mr. Justice Bailey granting motion for leave to amend.
9. Order granting motion for leave to amend and permitting plaintiff to file proposed amended bill of complaint.
10. Amended bill of complaint.
11. Motion to dismiss amended bill of complaint
12. Memorandum opinion of Mr. Justice Bailey overruling motion to dismiss amended bill of complaint.
13. Order denying motion to dismiss amended bill of complaint.
14. Order showing allowance of special appeal by Court of Appeals.
15. Assignment of errors.
16. This designation.

NATHAN R. MARGOLD,
Solicitor, Department of the Interior,
FREDERICK BERNAYS WIENER,
Assistant Solicitor, Department of the Interior,
JACKSON E. PRICE,
Assistant Solicitor, Department of the Interior,
Attorneys for the Defendant.

Service of a copy of the above designation of record acknowledged this 26th day of July 1935.

PRESTON B. KAVANAGH,
One of the Attorneys for the Plaintiff.

48 [Clerk's certificate to foregoing transcript omitted in printing.]

49 In United States Court of Appeals

[Title omitted.]

Minute entry

January 7, 1936

The argument in the above entitled causes was commenced by Mr. F. B. Wiener, attorney for appellant, and was continued by Mr. Stephen E. Chaffee, attorney for appellees, and was concluded by Mr. F. B. Wiener, attorney for appellant.

50 In the United States Court of Appeals for the District of Columbia

No. 6541

HAROLD L. ICKES, SECRETARY OF THE INTERIOR, APPELLANT

v.

MAZINE Z. FOX AND JOSIE R. FOX, HIS WIFE, APPELLEES

No. 6542

HAROLD L. ICKES, SECRETARY OF THE INTERIOR, APPELLANT

v.

PHILIP LOUIS PARKS AND OLLIE D. PARKS, HIS WIFE, APPELLEES

No. 6543

HAROLD L. ICKES, SECRETARY OF THE INTERIOR, APPELLANT

v.

JACOB F. OTTMULLER, APPELLEE

Appeal from the Supreme Court of the District of Columbia

Decided June 8, 1936

Nathan R. Margold, Frederick Bernays Wiener, Jackson E. Price, of Washington, D. C., for Appellants.

Preston B. Kavanagh, P. C. King, Jr., of Washington, D. C., and Stephen E. Chaffee, of Sunnyside, Washington, for Appellees.

BEFORE MARTIN, Chief Justice; ROBB, VAN ORSDEL, GRONER, and STEPHENS, Associate Justices

Opinion

VAN ORSDEL, Associate Justice. These are three special appeals by the Secretary of the Interior, Harold L. Ickes, from orders of the

Supreme Court of the District of Columbia denying his motions to dismiss amended bills in equity brought by appellees, plaintiffs below, to restrain the defendant Ickes, as Secretary of the Interior, from the enforcement of certain public notices issued by his predecessor, in office, Ray Lyman Wilbur, limiting plaintiffs' water right appropriations in the Sunnyside Unit of Yakima Project, a Federal Reclamation Project in the State of Washington, to an amount of water much less than the rights and privileges which plaintiffs enjoyed prior to the promulgation of the notices and orders in question.

Pursuant to the terms of the Reclamation Act of June 17, 1902, 32 Stats. 328, as amended U. S. C., T. 43, Chap. 12, the United
51 States undertook the construction and operation of the Yakima Project. Acting under the law, the United States purchased from the Washington Irrigation Company the Sunnyside Canal, water appropriations and irrigation system used in connection therewith. In addition to the rights thus procured, the United States secured appropriations from the Yakima river system, pursuant however to the express provisions therefor in the laws of the State of Washington, and provided storage for the waters thus appropriated from the state in reservoirs constructed, owned, and operated by the United States. Plaintiffs were appropriators and owners of water rights in the Sunnyside Canal from the Washington Irrigation Company long prior to its purchase by the United States. Plaintiffs were required by the government, as a condition of procuring water for irrigation of their lands, to execute and deliver to the United States certain water-right obligations. In consideration of procuring these rights, plaintiffs were required to pay to the government of the United States "the sum of $10.00 per acre for the benefits to be derived from said project of the United States", which amount it is alleged has been fully paid and any claims therefor from the government, or liens thereunder, have been fully satisfied and discharged.

It is important at this point to ascertain the nature of the water-rights purchased from the United States by plaintiffs or their predecessors as stated in the several applications. In the Fox case: "The measure of the water right for said land is that quantity of water which shall be beneficially used for the irrigation thereof, but in no case exceeding the share proportionate to irrigable acreage, of the water supply actually available as determined by the project manager or other proper officer of the United States, or of its successors in control of the project, during the irrigation season for the irrigation of lands under said unit." In the Parks case the measure of the water right purchased is fixed in the application as follows: "The amount of water to be furnished hereunder shall be three (3) acre-feet of water per annum per acre measured at the land, or as much more water as will be required to successfully irrigate the land, the amount so required to be determined by the authorized agent of the United States, and the water shall be used only to irrigate said lands

and for domestic purposes incident thereto; provided, that the amount of water furnished shall be limited to the amount beneficially used upon such lands." In the Ottmuller case the water right application provided: "The quantity of water to be furnished thereto shall be three (3) acre-feet of water per annum per acre of irrigable land as aforesaid, measured at the land; or so much thereof as did constitute the proportionate share per acre from the water supply actually available for the lands under said project; provided, that the supply furnished shall be limited to the amount of water beneficially used on said irrigable land."

Plaintiffs, in their amended bills of complaint, base their rights to the use of water primarily on the rights acquired by them or their predecessors by purchase from the Washington Irrigation Company, under which it is alleged there was furnished by the
52 company and beneficially used upon the lands in question: In the case of Parks, 6 acre-feet of water per acre per annum; in the case of Ottmuller, 5.56 acre-feet of water per acre per annum; and in the case of Fox, 4.84 acre-feet of water per acre per annum; which rights under the laws of the State of Washington became appurtenant to the lands and is real estate. (Rem. R. S. Wash. Sec. 7391.)

It is alleged by the plaintiffs in their respective bills that the United States completed the construction of the irrigation unit, constructed reservoirs of sufficient capacity to beneficially and successfully irrigate all lands within said unit, and a determination had been made that the respective amounts originally acquired by the plaintiffs of water per acre per annum was necessary to beneficially and successfully irrigate the lands, and after the delivery of the water for several years and its beneficial use Congress passed an Act (38 Stat. 687; 43 U. S. C. A., Sec. 469), providing: "No increase in the construction charges shall, after August 13, 1914, be made after the same have been fixed by public notice, except by agreement between the Secretary of the Interior and a majority of the water-right applicants and entrymen to be affected by such increase." This restriction was confirmed on September 24, 1914, by Franklin K. Lane, then Secretary, in a public notice, as follows: "The amount of the construction charge per irrigable acre for lands for which entry under the provisions of the Reclamation Act of June 17, 1902 (32 Stat. 388), or water-right application has heretofore been made, shall be the amount fixed in the several public notices heretofore issued for the respective lands and therein termed 'the building charge', and will not be increased, except as provided in said Reclamation Extension Act."

The statute law of the State of Washington provides: "The right to the use of water which has been applied to a beneficial use in the State shall be and remain appurtenant to the land or place upon which the same is used." (Remington's R. S., Sec. 7391.) In view of this statute, the successive Secretaries of the Interior construed the contracts as conveying to each purchaser a sufficient amount of

water to beneficially and successfully irrigate his land. Indeed, this was imperative under Sec. 8 of the Reclamation Act (43 U. S. C. A., Sec. 372), which provides: "The right to the use of water acquired under the reclamation law shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right."

It is alleged that "it was determined by the successive Secretaries of the Interior, their representatives, and their subordinates", that in the case of Parks, 6 feet of water per acre per annum; in the case of Ottmuller, 5.56 feet; and in the case of Fox, 4.84 acre-feet "was necessary to beneficially and successfully irrigate said land; that pursuant to said practical construction and determination the successive Secretaries of the Interior, their representatives and subordinates have for a period of more than 20 years delivered to said land the amount of water necessary to beneficially and successfully irrigate the same, which water has at all times been beneficially used thereon for irrigation purposes."

It is alleged that in the year 1930, Elwood Mead, Commissioner of Reclamation of the United States, recommended the construc-
53 tion of the Cle Elum Reservoirs at a cost of $3,500,000 for the purpose of storing water for the irrigation of lands in Kittitas Reclamation District, and also for the purpose of supplying water for the irrigation of lands in the Roza and Kennewick divisions of the Yakima Project. Mead, it is alleged, ascertained that the cost of the reservoir would be $1,000,000 more than the amount that would be returned to the reclamation fund from these divisions. It was necessary, therefore, before the commencement of reservoir construction that a source should be ascertained from which the $1,000,000 could be obtained. It is alleged that Mead accordingly "without consulting these plaintiffs or other water users in said unit in said District, charged the sum of $1,000,000 to said unit in said District and furnished the Secretary of the Interior information that provision had been made for the payment by said unit of said sum."

It is also alleged that thereafter Mead and one Stoutemyer, District Counsel, and Secretary Wilbur, in order to compel the plaintiffs and other water users to contract to pay the sum of $1,000,000, caused the Assistant Secretary of the Interior on October 17, 1930, to issue an order which, among other things, provided: "The water applications and water-right contracts which determine the limit of the individual water rights in the Sunnyside Valley Irrigation District provided in most cases—

(A) For the delivery of three (3) acre-feet of water or so much thereof as is necessary for beneficial use in years of ordinary run-off in the Yakima River, with a provision for pro rata reduction in years of unusual drought or low water.

(B) Some of such applications or contracts provide for delivery of 3 acre-feet subject to a proviso 'that the amount of water furnished shall be limited to the amount beneficially used upon said lands.'

(C) Still other applications or contracts provide for the delivery of 3 acre-feet per annum per acre, 'or as much more water as will be required to successfully irrigate the land, the amount so required to be determined by the authorized agent of the United States', and subject to the proviso 'that the amount of water furnished shall be limited to the amount beneficially used upon such lands', and the further provision 'that the United States shall not be responsible for the failure to supply water under this contract caused by insufficient supply of water in the Yakima River, due to hostile diversion or unusual drought.'"

After a statement by the Assistant Secretary on the economical use of water for irrigation to avoid waste, and the additional storage capacities that would be supplied, and the statement that heretofore due to the fact that the Kittitas division of the Yakima project had not been completed, it had been possible to permit water users in the Sunnyside Valley irrigation District to use water in excess of amounts specified in their contracts and applications, it was ordered: "In order that all water users in the Sunnyside Valley Irrigation District may know in advance that economy in the use of water will hereafter be necessary, and be prepared to take care of the water and use it to the best advantage, notice is hereby given that as to all lands
except those above referred to in paragraph (C), during the
54 year 1931 and subsequent years, until further notice, water
deliveries in that district will be limited to three (3) acre-feet per irrigable acre per year, as specified in the said contracts and applications, except in years of unusual drought or low water, when it will be necessary to limit deliveries to a somewhat smaller amount as provided for in said contracts applicable to the lands of the District; provided, however, that so long as there is surplus stored water available not required to meet contract obligations to the United States to other parties, water in excess of three acre-feet may be rented by water users of the Sunnyside Valley Irrigation District of the classes referred to above as 'A' and 'B', whose rights are limited under their applications and contracts to 3 acre-feet. The water-rental charge for such extra water in excess of 3 acre-feet, used during the irrigation season of 1931, will be one dollar and fifty cents ($1.50) per acre-foot, and the rental rate will be announced annually for subsequent seasons. All money collected for the rental of such extra water will be applied toward the payment of the unsecured portion of the construction costs of the reservoir system of the Yakima project."

A further notice and order was given by the First Assistant Secretary of the Interior on May 5, 1932, in which a classification of the lands was made as those entitled to three acre-feet per acre, 3.5 acre-feet per acre, and four acre-feet per acre. This classification was made by one W. W. Johnson in a report of February 1932. It was then ordered that water users under these various classifications "except in years of unusual drought or low water, when water deliveries to said lands may be limited to less than the quantities herein

designated, the amount indicated for that class will constitute the required water deliveries to said land"; and that water deliveries beginning with the irrigation season of 1932 "in excess of the above determined quantity per acre, will be suggested to water-rental charges at rates established in public notice for the irrigation season of 1932 and in subsequent public notices."

These orders amounted to notice to Fox and Ottmuller that they would be deprived of all water rights in excess of three acre-feet of water per annum, and that Parks would likewise be deprived of all water rights in excess of 3½ acre-feet per annum, unless plaintiffs would sign a new water rental application which they, together with all other water-rights applicants, refused to sign. This application provided as follows: "The undersigned applicant requests excess water under public notice issued by the Secretary February 19, 1932, and agrees to pay applicable charges, with 6% interest from December 1, 1932, until paid. He further agrees that water may be withheld from his land after 1932 until such charges are paid. It is understood that advance payment for excess water will be required in 1933, if the 1932 rental charge remains unpaid at that time."

We are confronted again by the usual contention that this is a suit against the United States, and as such cannot be maintained. This is urged on the theory that the action is one to require the specific performance of a contract with the United States. This is not an action for specific performance. It is an action to restrain the Secretary of
55 the Interior from enforcing the alleged illegal orders issued by that officer and his predecessor in office in his capacity as the administrative agent of the government for the construction of irrigation works and the disposition of the same under the Reclamation Act (38 Stat. 690, Sec. 15; 43 U. S. C. A., Sec. 373). The suit, therefore, is one against an agent of the government and not against the government itself, since no complaint is here made by the plaintiffs of the existing contracts between them and the government. The validity of the contracts between the government and the plaintiffs is not here in issue. The question is whether or not the orders promulgated amount to a valid and enforceable extension of the terms of the contract. If not the orders will be determined as unenforceable and the contracts will remain valid as if the orders had never been issued.

This brings us to the consideration of the authority of the Secretary to issue the orders here in question. The water rights here involved were primarily derived through the contracts of the plaintiffs or their predecessors with the Washington Irrigation Company. Under that authority, and in conformity with the laws of the State of Washington, the plaintiffs acquired sufficient water, beneficially used, to irrigate their lands, and these rights were not subsequently modified to any extent by the contracts entered into with the government after the government had acquired the rights of the Washington Irrigation Company. While in two of the contracts here in question the amount is fixed at 3 and one at 3½ feet per acre, this

seems to have been put in as a minimum amount, since there was a further qualification permitting of the use of sufficient water to beneficially and successfully irrigate their lands. This is the legal measure of right to use fixed by the laws of the tSate of Washington and by the Reclamation Act. This amount had been fixed through prior application and use of the water at six feet per acre in the case of Parks, 4.84 feet per acre in the case of Fox, and 5.56 feet per acre in the case of Ottmuller. This amount was found to be necessary to beneficially and successfully irrigate the land; and under Section 7390 Rem. Rev. Stat. of Washington, "the right to the use of water which has been applied to beneficial use in the State shall be and remain appurtenant to the land or place upon which the same is used."

Under the Reclamation Act the United States, in putting in an irrigation enterprise, stands in the same position with relation to the State as a private individual. The waters belong to the State, and the United States never acquires any title therein any more than a private appropriator.

It is settled irrigation law that mere diversion and storage of water does not constitute an appropriation. Before there can be an appropriation the water must be applied to a beneficial use. Highland Ditch Company v. Union Reservoirs Company, 127 Pac. 1025. In Paine Irrigation District v. Board of Commisisoners, 236 Fed. 790, the court, considering constitutional and statutory provisions similar to those of the State of Washington, held that under the Constitution and statute relating to water rights, as construed by the Supreme Court of the State, no property right can be acquired in the use of water until it is applied to a beneficial use. The owner of the carrying ditch gets no title or right to the use of the water and has
56 no property in it subject to disposal, but such property right of disposal is in him who applies the water to beneficial use.

It is clear, therefore, that the United States under the proceedings provided in the Reclamation Act acquires no title to the water. It is merely a carrier and distributor of the water, and the only title acquired which consists only of a right of use is in the appropriator who applies the water to a beneficial use. To proceed under the Reclamation Act the United States must make application for a permit to appropriate the waters and to distribute it for beneficial purposes. The state does not surrender its right to control its use. The 1,000 cubic feet appropriated in 1891 was appropriated by the application of the water to beneficial use, and under such circumstances the water becomes a part and parcel of the land and is appurtenant thereto. This rule was recognized in the Reclamation Act (43 U. S. C. A., Sec. 372), where it is specifically provided that the water right is appurtenant to the lands irrigated.

Secretary Garfield in 1909, pursuant to 43 U. S. C. A., Sec. 419, made a finding as to the cost of the irrigation system in addition to the purchase price paid the Washington Irrigation Company, and fixed the price at $52.00 per acre, which sum would return to the

Reclamation fund the total cost of the Project. A public notice and order was issued fixing this charge. It is alleged that under the administration of the Reclamation Act prior to the action of Mead and Wilbur and the orders here complained of, the Reclamation Act was construed, and the contracts made thereunder were construed, as holding that water users were entitled to a sufficient amount of water to beneficially and successfully irrigate their lands; and that it was determined by successive Secretaries that 4.84 feet per annum was necessary for the Fox land, 5.56 feet for the Ottmuller land, and 6 feet for the Parks land, to beneficially and successfully irrigate the same. In accordance with these ascertained facts, Congress passed the Reclamation Extension Act of August 13, 1914, which, among other things, provides: "No increase in the construction charges shall, after August 13, 1914, be made, after the same have been fixed by public notice, except by agreement between the Secretary of the Interior and a majority of the water-right applicants and entrymen to be affected by such increase. 38 Stats. 687, 43 U. S. C. A. 469.

Pursuant to this Act Franklin K. Lane, then Secretary of the Interior on September 24, 1914, issued a public notice and order as follows: "The amount of the construction charge per irrigable acre for lands for which entry under the provisions of the Reclamation Act of June 17, 1902 (32 Stat. 388), where water-right application has heretofore been made, shall be the amount fixed in the several public notices heretofore issued for the respective lands and therein termed 'the building charge', and will not be increased, except as provided in said Reclamation Extension Act." It is alleged in substance that the Sunnyside Irrigation District was organized in 1918, and a contract was entered into with the United States under which the District assumed and agreed to pay construction charges to the extent of $2,000,000 and all obligation and maintenance charges. In pursuance of 43 U. S. C. A., Sec. 512, the Secretary released all liens on the lands of said unit for construction, operation, and maintenance charges.

57 The court below was right in overruling the motions to dismiss the bills of the respective plaintiffs, and the order denying the motions is affirmed.

JOSIAH A. VAN ORSDEL,
Associate Justice.

Dissenting opinion

STEPHENS, Associate Justice, dissenting: In my opinion the United States is a necessary party to these suits; and since it has not consented to be sued, they cannot proceed. Necessary parties are those "affected by the judgment and against which in fact it will operate. . . ." Minnesota v. Hitchcock, 185 U. S. 373, 387. Whether or not title to the water in question is in the United States, the latter is a party to contracts to deliver water. If the asserted reductions made by United States officials in the amounts of water to be delivered under the contracts were illegal, then the United States is bound to

deliver the former amounts. If the reductions are legal, it is not so bound and may therefore, for a consideration valuable to itself, contract for delivery of the difference to the plaintiffs, if they desire it, or to third parties. The point is, in my opinion, controlled by the principle actuating the decisions in: Payne v. Central Pac. Ry. Co., 255 U. S. 228; Northern Pac. Ry. Co. v. North Dakota, 250 U. S. 135; Wells v. Roper, 246 U. S. 335; Lane v. Watts, 234 U. S. 525; United States v. Lee, 106 U. S. 196; Transcontinental & Western Air v. Farley, 71 F. (2d) 288, certiorari denied, 293 U. S. 603. This principle and the application thereof I discussed in my separate opinion in Township of Franklin et al. v. Rexford G. Tugwell et al., decided by this court May 18, 1936, — App. D. C. —, — F. (2d) —. In respect of the situation here involved, I think Wells v. Roper and Transcontinental & Western Air v. Farley are in point and controlling.

58 In United States Court of Appeals

No. 6543, April term, 1936

HAROLD L. ICKES, SECRETARY OF THE INTERIOR, APPELLANT

vs.

JACOB F. OTTMULLER

Judgment

June 8, 1936

Appeal from the Supreme Court of the District of Columbia.

This cause came on to be heard on the transcript of the record from the Supreme Court of the District of Columbia, and was argued by counsel.

On consideration whereof, It is now here ordered, adjudged, and decreed by this Court that the order of the said Supreme Court in this cause be, and the same is hereby, affirmed.

Per Mr. Justice VAN ORSDEL.

JUNE 8, 1936.

Dissenting opinion by Mr. Justice Stephens.

59 Memorandum: Motion to Stay Mandate Filed June 17, 1936.

60 In United States Court of Appeals

[Title omitted.]

Order granting motion to stay mandate

July 6, 1936

On consideration of Appellant's motion for a stay of the mandates herein, under Rule 24, pending application for certiorari to the

Supreme Court of the United States, It is ordered by the Court that the motion be, and it hereby is, granted.

61 In United States Court of Appeals for the District of Columbia

[Title omitted.]

Designation of record

Filed June 23, 1936

The clerk in the preparation of the transcript of record on petition for certiorari to the Supreme Court of the United States will include the following:

1. Printed record.
2. Note of argument.
3. Opinion of the court.
4. Decree.
5. Memorandum of filing motion to stay mandate.
6. Minute entry granting stay of mandate.
7. This designation.
8. Clerk's certificate.

STANLEY REED,
Solicitor General.

[File endorsement omitted.]

62 [Clerk's certificate to foregoing transcript omitted in printing.]

63 Supreme Court of the United States

Order allowing certiorari

Filed October 12, 1936

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(Endorsement on cover:) File Nos. 40806, 40807, 40808. District of Columbia, U. S. Court of Appeals. Term No. 266. Harold L. Ickes, Secretary of the Interior, petitioner, vs. Mazine Z. Fox et al. Term No. 267. Harold L. Ickes, Secretary of the Interior, petitioner, vs. Phillip Louis Parks et al. Term No. 268. Harold L. Ickes, Secretary of the Interior, petitioner, vs. Jacob F. Ottmuller. Petition for writs of certiorari and exhibits thereto. Filed August 7, 1936. Term Nos. 266 O. T. 1936, 267 O. T. 1936, 268 O. T. 1936.

U. S. GOVERNMENT PRINTING OFFICE: 1938

Supreme Court of the United States. It is ordered by the Court that the motion be, and it hereby is, granted.

61 In United States Court of Appeals for the District of Columbia

[Title omitted.]

Designation of record

Filed June 23, 1936

The clerk in the preparation of the transcript of record on petition for certiorari to the Supreme Court of the United States will include the following:

1. Printed record.
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4. Decree.
5. Memorandum of filing motion to stay mandate.
6. Minute entry granting stay of mandate.
7. This designation.
8. Clerk's certificate.

STANLEY REED,
Solicitor General.

[File endorsement omitted.]

62 [Clerk's certificate to foregoing transcript omitted in printing.]

63 Supreme Court of the United States

Order allowing certiorari

Filed October 12, 1936

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(Endorsement on cover:) File Nos. 40806, 40807, 40808. District of Columbia, U. S. Court of Appeals. Term No. 266. Harold L. Ickes, Secretary of the Interior, petitioner, vs. Mazine Z. Fox et al. Term No. 267. Harold L. Ickes, Secretary of the Interior, petitioner, vs. Phillip Louis Parks et al. Term No. 268. Harold L. Ickes, Secretary of the Interior, petitioner, vs. Jacob F. Ottmuller. Petition for writs of certiorari and exhibits thereto. Filed August 7, 1936. Term Nos. 266 O. T. 1936, 267 O. T. 1936, 268 O. T. 1936.

U. S. GOVERNMENT PRINTING OFFICE: 1936

FILE COPY

Nos. 246-247-268

In the Supreme Court of the United States

OCTOBER TERM, 1939

HAROLD L. ICKES, SECRETARY OF THE INTERIOR, PETITIONER

v.

MAZINE Z. FOX, ET AL.

HAROLD L. ICKES, SECRETARY OF THE INTERIOR, PETITIONER

v.

PHILIP LOUIS PARKS, ET AL.

HAROLD L. ICKES, SECRETARY OF THE INTERIOR, PETITIONER

v.

JACOB F. OTTENHEIMER

PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

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In the Supreme Court of the United States

OCTOBER TERM, 1936

No. —

HAROLD L. ICKES, SECRETARY OF THE INTERIOR,
PETITIONER

v.

MAZINE Z. FOX, ET AL.

No. —

HAROLD L. ICKES, SECRETARY OF THE INTERIOR,
PETITIONER

v.

PHILLIP LOUIS PARKS, ET AL.

No. —

HAROLD L. ICKES, SECRETARY OF THE INTERIOR,
PETITIONER

v.

JACOB F. OTTMULLER

PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

The Solicitor General, on behalf of the United States, prays that writs of certiorari issue to re-

view the judgments of the United States Court of Appeals for the District of Columbia entered in the above causes on June 8, 1936, affirming the judgments of the Supreme Court of the District of Columbia, now the United States District Court for the District of Columbia.

OPINIONS BELOW

The Supreme Court of the District of Columbia filed a brief memorandum opinion relating to the motions for leave to file amended bills of complaint (Fox, R. 29; Parks and Ottmuller, R. 22) which was, in effect, adopted in the memorandum opinion upon the motions to dismiss (Fox, R. 47; Parks, R. 38; Ottmuller, R. 44). The opinion of the Court of Appeals (Fox, R. 52; Parks, R. 43; Ottmuller, R. 49) has not yet been reported.

JURISDICTION

The judgments of the Court of Appeals were entered on June 8, 1936 (Fox, R. 60; Parks, R. 51–52; Ottmuller, R. 57–58). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Is the United States an indispensable party defendant in these actions?

2. Did the bills of complaint fail to disclose a basis for equitable jurisdiction?

STATUTES INVOLVED

The cases relate to a Federal reclamation project in the State of Washington, authorized by the reclamation law (c. 12, U. S. C., Title 43) and applicable statutes of the State of Washington (Remington's Revised Statutes of Washington, §§ 7408–7415). The pertinent provisions are set forth in the Appendix (*infra*, pp. 17–29).

STATEMENT

These were three special appeals to the United States Court of Appeals for the District of Columbia by the Secretary of the Interior, Harold L. Ickes, from orders of the Supreme Court of the District of Columbia which denied his motions to dismiss amended bills in equity brought, in the language of the bills, to require him to vacate certain notices and orders relating to the Sunnyside Unit of the Yakima Project, a Federal reclamation project in the State of Washington, and to restore respondents "to the rights and privileges which they enjoyed prior to the promulgation of said notices and orders" (Fox, R. 39; Parks, R. 31; Ottmuller, R. 32). The three cases have, for purposes of argument, been consolidated in both of the lower courts.

Pursuant to the reclamation law (U. S. C., Title 43, c. 12) and applicable statutes of the State of Washington (Remington's Revised Statutes of Washington, §§. 7408–7415), the United States

undertook the construction and operation of the Yakima Project, and in connection therewith purchased from the Washington Irrigation Company the Sunnyside Canal, water appropriations, and irrigation system used in connection therewith (Fox, R. 30; Parks, R. 23; Ottmuller, R. 23).

Before the owners of the lands within the Sunnyside Unit of the Yakima Project now held by the respondents could procure from the proposed irrigation system water for the irrigation of said lands, it was necessary that they execute and deliver to the United States water right applications or contracts (Fox, R. 31, 16, 19, 22; Parks, R. 24, 14; Ottmuller, R. 25, 34). By virtue of these water right applications and contracts, respondents' predecessors became entitled to receive designated amounts of water from the United States under specified conditions.

Thereafter public notice was given under date of October 17, 1930, by Assistant Secretary of the Interior Edwards that, although it had theretofore been possible to allow users of the Sunnyside District temporarily to use water in excess of the amounts specified in their applications and contracts, it had become necessary to restrict such users to their specified amounts (Fox, R. 43–44; Parks, R. 34–36; Ottmuller, R. 40–41). Pursuant to this notice and, in the Parks case, a later notice of May 5, 1932 (Parks, R. 36–37), respondents were limited to substantially smaller amounts of water

than they had theretofore received (Fox, R. 34–35; Parks, R. 27; Ottmuller, R. 28).

Respondents by three similar bills of complaint filed September 24, 1934 sought to enjoin petitioners from enforcing these orders (Fox, R. 1–11; Parks, R. 1–10; Ottmuller, R. 1–11). Upon motion of petitioner these bills were dismissed on the ground that they each sought specific enforcement of contracts of the United States (Fox, R. 28; Parks, R. 20; Ottmuller, R. 21). Respondents with leave of court (Fox, R. 29; Parks, R. 22; Ottmuller, R. 22–23) filed amended bills (Fox, R. 29–39; Parks, R. 22–31; Ottmuller, R. 23–32). Petitioner's motions to dismiss the amended bills on the same grounds (Fox, R. 46–47; Parks, R. 37–38; Ottmuller, R. 43–44) were denied for the reasons that the orders deprived respondents of vested rights and that the suits were not brought against the United States but to set aside arbitrary acts of petitioner (Fox, R. 47–48, 29; Parks, R. 38, 22; Ottmuller, R. 44–45, 22). Upon special appeal to the Court of Appeals this decision, for reasons referred to hereafter, was affirmed, Mr. Justice Stephens dissenting (Fox, R. 52–60; Parks, R. 43–52; Ottmuller, R. 49–58).

SPECIFICATION OF ERRORS TO BE URGED

The United States Court of Appeals for the District of Columbia erred:

1. In holding that the Supreme Court of the District of Columbia had jurisdiction to entertain

these suits, in substance and effect suits to compel specific performance of contracts to which the United States is a party and to affect property in which it has an interest.

2. In holding that the present suits do not seek in substance and effect specific performance of contracts to which the United States is a party.

3. In holding that the United States was not an indispensable party defendant in these suits.

4. In failing to hold that the amended bills of complaint and the exhibits attached thereto and made a part thereof show that the suits were brought on contracts to which the United States is a party, and that the decree prayed for would affect the interests of the United States in said contracts and the property of the United States, and that consequently the court was without jurisdiction.

5. In failing to hold that the remedy at law was adequate, and that hence the court lacked equity jurisdiction.

6. In affirming the judgment of the Supreme Court of the District of Columbia, denying the respondent's motions to dismiss the amended bills of complaint.

REASONS FOR GRANTING THE WRIT

I

1. The decision of the United States Court of Appeals for the District of Columbia is not in accord with the decision of this Court in the case of

State of Arizona v. *State of California, et al.*, No. —, Original, October Term 1935, decided May 25, 1936.

Unquestionably the United States acquires, by virtue of a reclamation project undertaken pursuant to the reclamation law and applicable state law, an interest in the waters which it appropriates and stores for irrigation purposes. *Ide* v. *United States*, 263 U. S. 497; *United States* v. *Union Gap Irrigation Dist.*, 39 F. (2d) 46 (C. C. A. 9th); *West Side Irrigation Co.* v. *United States*, 246 Fed. 212 (C. C. A. 9th). See *Arizona* v. *California, supra*, pamphlet p. 9. Cf. *Ashwander* v. *Tennessee Valley Authority*, 297 U. S. 288, 330. The present bills allege that they involve an approved irrigation and reclamation project and disclose that respondents have availed themselves of the benefits of the reclamation law (Fox, R. 30–33; Parks, R. 23–25; Ottmuller, R. 23–26). No question has been raised as to the propriety of the project and, indeed, under the circumstances, none could be raised by respondents. The relief sought by respondents is the vacation of certain notices and orders limiting the amount of water controlled by the United States pursuant to the reclamation law, which respondents may receive pursuant to their water rights and the restoration of respondents "to the rights and privileges which they enjoyed prior to the promulgation of said notices and orders" (Fox, R. 39; Parks, R. 31; Ottmuller, R. 32). Wholly apart from any technical question of title in the waters controlled by the

United States, a decree granting such relief, as this Court said in *Arizona* v. *California, supra* (pamphlet, p. 10), "could not be framed without the adjudication of the superior rights asserted by the United States." Furthermore, the orders attacked by respondents recite (Fox, R. 44; Parks, R. 35; Ottmuller, R. 41) that the diminution of the amounts of water respondents would thereafter receive was required for the performance by the United States of its contract with the Kittitas Reclamation District. As in *Arizona* v. *California, supra* (pamphlet, p. 10), the present bills plainly challenge dispositions agreed to by contracts of the United States. That decision requires the dismissal of the present bills because of the absence of the United States as a party defendant.

2. The opinion of the Court of Appeals is in conflict with the decision of the Circuit Court of Appeals for the Ninth Circuit in *American Falls Reservoir District No. 2* v. *Crandall, et al.*, 82 F. (2d) 973.

There the United States had in 1927 entered into a contract with the reservoir district to deliver to the district a certain quantity of the waters of the Snake River, Idaho, stored by the Government in the American Falls Reservoir. Thereafter both natural flow water appropriated by the United States and stored water controlled by it were delivered to the district under the contract. In 1933 no natural flow water was so delivered and the district thereupon sought to require delivery of a

given amount of such water, claiming that under a specific provision of the Idaho Constitution the United States had by the prior deliveries dedicated to the use of the district an amount of the natural flow water. The Secretary of the Interior, who was made a party defendant, filed a motion to dismiss on the ground that the United States was an indispensable party. In its opinion sustaining this motion, the court said (p. 978):

> Of course, it could be considered that appellant has acquired a vested right, and is merely attempting to require the Secretary to proceed in conformity with the constitutional provisions [of Idaho] hereinabove quoted. However, it seems to us that the nub of the question would be, first, whether or not appellant had acquired a vested right, and to determine in favor of appellant on such a question would be depriving the United States of its property right (claimed by appellant in this suit) without giving the United States an opportunity to defend the suit. This we cannot do; therefore we hold that the suit should have been dismissed on that ground. * * *

3. In the instant cases there is no basis for any contention such as was made in the *Crandall* case, *supra,* that respondents have acquired vested rights apart from their contracts. The only rights respondents have are based on contracts with the United States and, consequently, the decision of the court below is not in accord with the decision of this Court in *Wells* v. *Roper,* 246 U. S. 335, and

departs from the rule previously established by the lower court pursuant to *Wells* v. *Roper* and left undisturbed by this Court upon application for writs of certiorari. *Boeing Air Transport* v. *Farley,* 75 F. (2d) 765, certiorari denied, 294 U. S. 728; *Transcontinental and Western Air, Inc.,* v. *Farley,* 71 F. (2d) 288, certiorari denied, 293 U S. 603; *United States ex rel. Shoshone Irrigation District* v. *Ickes,* 70 F. (2d) 771, certiorari denied, 293 U. S. 571.

It is apparent on the face of the record in each of the instant cases that the remedies sought by the respective respondents are in effect the specific enforcement of contracts with the United States. It is respondents' contention that by virtue of their actual receipt and use of water under prior governmental determination in excess of the amount fixed by the orders and notices, they have acquired property rights independent of their contractual rights (Fox, R. 32–33; Parks, R. 23, 24–25; Ottmuller, R. 25–26.) In the *Parks* case the right is alleged to have been acquired by actual use prior to the contractual arrangements with the United States (R. 23)[1], although the theory adopted by the other respondents is also relied upon (R. 24–25).

[1] The Court of Appeals states in its opinion (Fox, R. 54; Parks, R. 45; Ottmuller, R. 51) that respondents base their claims "primarily on the rights acquired by them or their predecessors by purchase from the Washington Irrigation Company." We do not understand respondents so to claim. In any event this statement is not warranted

This contention, and the opinion of the Court of Appeals in so far as it adopts respondents' argument on this point, misconceives the applicable doctrine of water-right law. A water right, in the sense of a property right acquired by prescription, can only arise from an appropriation of flowing waters from a natural stream. 2 Kinney, Irrigation and Water Rights (2d ed., 1912), Secs. 758, 759, 761. The reclamation law, which expressly adopts state laws on the subject of water rights (43 U. S. C. 383, *infra*), contains nothing to modify this general doctrine. Assuming that contract rights to use stored water, as well as perfected water rights in the property sense, are to be appurtenant to the land served (see 43 U. S. C. 372), the contract

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upon the records in these cases. As applied to respondents Fox and to respondent Ottmuller, it finds no possible support in the record. The bill of complaint in the *Parks* case asserts that prior to the initiation of the Yakima project the then owners of the land involved in that case purchased a water right for their land and "that after said purchase there was actually furnished * * * six acre-feet of water" (R. 23). It is significant that the bill does not allege that the *purchase* was of such an amount of water. On the contrary, the original bill alleged that the Washington Irrigation Company water right "was equivalent to 2.62 acre-feet" (R. 2), whereas the orders attacked by respondents Parks are alleged by them to restrict them to the use of 3½ acre-feet (R. 27). At all events, it is clear that, so far as the Irrigation Company is concerned, respondents Parks claim by virtue of use pursuant to a contract to receive stored water, not as assignees of an actual appropriation of flowing waters. The importance of this distinction in the instant cases is pointed out subsequently in the text.

rights are not thereby converted into property regardless of the terms of the agreements from which they spring. See 43 U. S. C. 479, 480, 495, 496, *infra*. *Cf. San Joaquin Co.* v. *Stanislaus County*, 233 U. S. 454, 459–460. In the instant case the only appropriator of water from a flowing stream is the United States, which acquired the appropriations of the Washington Irrigation Company (Fox, R. 30; Parks, R. 23; Ottmuller, R. 23) and, pursuant to the applicable Washington statutes, *infra*, directly acquired other appropriations.

The law of the State of Washington, like that of the arid States generally (see 2 Kinney, op. cit. *supra*, Sec. 774; Wiel, Water Rights in the Western States (3d ed., 1911), Sec. 35), recognizes that water once diverted from flowing streams becomes, in the ditches and reservoirs of the appropriators, personalty subject to contractual disposition. *Methow Cattle Company* v. *Williams*, 64 Wash. 457, 460. Such rights as respondents acquired were to receive stored water which the United States (and, as to part of the water to which respondents Parks are entitled, the Irrigation Company) had appropriated and of necessity must be derived from and subject to the applications and contracts relating thereto. *Cf. State ex rel. Krutz* v. *Washington Irrigation Co.*, 41 Wash. 283, and cases cited, *infra*, p. 14. No contention is made that the United States (or, in the *Parks* case, the Irrigation Company) assigned its appropriation or any part

thereof to respondents. It is further significant that respondents allege no use adverse to the United States (or, in the *Parks* case, to the Irrigation Company) upon which a prescriptive right could be founded even if such doctrines of real estate law were here applicable. Since the relief here sought necessarily involves the construction of contracts to which the United States is a party [2] and, hence, in effect seeks specific performance of such contracts as construed by respondents, it is clear that the suits cannot be maintained in the absence of the United States as a party. *Wells* v. *Roper, supra,* and prior decisions of the Court of Appeals cited *supra,* p. 10.

II

The decisions below are not in accord with the well settled doctrine repeatedly enunciated by this Court that where the remedy at law is adequate relief may not be afforded by a court of equity. *Hurley* v. *Kincaid,* 285 U. S. 95; *Armour & Co.* v. *Dallas,* 255 U. S. 280. As has been demonstrated above (pp. 6 to 13), respondents' rights are contractual. The Washington courts have expressly recognized that an action at law lies for breach of

[2] It should be further noted that, despite respondents' attempts to describe their interests as real estate, the contractual nature of their rights is expressly recognized by paragraph XVIII in each of the amended bills which bases the claims upon a construction of the respective contracts (Fox, R. 36; Parks, R. 28–29; Ottmuller, R. 29–30).

a contract to deliver water. *State ex rel. Krutz* v. *Washington Irrigation Co., supra; Lombard* v. *Schlofeldt,* 68 Wash. 518; *Huschke* v. *Arcadia Orchards Co.,* 89 Wash. 423; *McDonald* v. *Prosser Falls Land & Power Co.,* 110 Wash. 175; *Hill* v. *Selah and Moxee Irrigation District,* 139 Wash. 120. It is plain that the respondents may sue the United States for any such breach. 28 U. S. C., Secs. 41 (20), 250 (1). See *North Platte C. & C. Co.* v. *United States,* 48 C. Cls. 281, 289–290. The Washington court has likewise held that the remedy at law for breach of a contract to deliver water is adequate. *State ex rel. Krutz* v. *Washington Irrig. Co., supra.* Consequently, the bills of complaint should have been dismissed because of the adequacy of the remedy at law.

These cases raise an important Federal question, and the matter involved is one of great and general public interest. The court's ruling in these cases affect the administration of the Reclamation Law by the Secretary of the Interior and the rights of the land owners in all of the Reclamation Projects throughout the West. The public interest will be promoted by prompt and permanent settlement in this Court of the questions here involved.

The same reasons which prompted the Court of Appeals to grant special appeals (pursuant to Section 26 of Title 18 of the Code of the District

of Columbia) for the determination of the issues here involved, call for the review by this Court at the present stage of the proceeding. Were these cases to be remanded for trials on the merits prior to a determination by this Court of the necessity of the presence of the United States as a party, witnesses would have to be brought from the State of Washington and protracted litigation would be necessary. The disruption to Government business by the attendance, far from their posts of duty, of officials called as witnesses, the expense to all parties concerned of lengthy litigation, and the heavy burden of such litigation on the lower courts will be avoided by a disposal of the cases at this stage upon the grounds here asserted.

Furthermore, there is every reason to believe, because of the generality of the orders here involved and similar orders applicable to other reclamation projects, that a considerable number of similar suits [3] will be filed if the questions of jurisdiction here presented are not promptly settled by this Court. If the contentions herein set forth are sound, trials in such cases can only result in ultimate dismissal for want of jurisdiction and will

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[3] It should be noted in this connection that other closely related cases have recently been or are now before the courts. See, for example, in addition to the *Crandall* case, *supra*, p. 8, *Moody* v. *Johnston*, 66 F. (2d) 999 (C. C. A. 9th), which was again considered by the same court in 70 F. (2d) 835; *Moody* v. *Smith*, 66 F. (2d) 1003; *Moody* v. *Francis*, 66 F. (2d) 1003; *Moody* v. *Scheer*, 66 F. (2d) 1004 (all C. C. A. 9th).

still further increase the needless burden on the courts, the Government and the other parties therein which the present cases will directly entail, unless the decisions below are reversed at this stage of the proceedings.

We submit that these cases call for the exercise of this Court's unquestioned authority (see *United States Shipping Board Merchant Fleet Corporation* v. *Rhodes,* 297 U. S. 383) to review the decision below. *Cf. Spiller* v. *Atchison, Topeka & Santa Fe Ry. Co.,* 253 U. S. 117, 121–122, based upon the more restrictive statutes relating to certiorari then in effect.

Wherefore, it is respectfully submitted that these petitions for writs of certiorari should be granted.

STANLEY REED,
Solicitor General.

AUGUST 1936.

APPENDIX

UNITED STATES CODE, TITLE 43

SEC. 371. *Definitions; "Secretary", "reclamation law", "reclamation fund", "project", and "division of a project."* When used in this chapter—

(a) The word "Secretary" means the Secretary of the Interior.

(b) The words "reclamation law" mean the provisions of this chapter.

(c) The words "reclamation fund" mean the fund provided by the reclamation law.

(d) The word "project" means a Federal irrigation project authorized by the reclamation law.

(e) The words "division of a project" mean a substantial irrigable area of a project designated as a division by order of the Secretary. (Dec. 5, 1924, c. 4, Sec. 4, subsec. A, 43 Stat. 701; Feb. 21, 1925, c. 277, Sec. 1, 43 Stat. 956.)

SEC. 372. *Water right as appurtenant to land and extent of right.*—The right to the use of water acquired under the provisions of the reclamation law shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right. (June 17, 1902, c. 1093, Sec. 8, 32 Stat. 390.)

SEC. 373. *General authority of Secretary of Interior.*—The Secretary of the Interior is hereby

authorized to perform any and all acts and to make such rules and regulations as may be necessary and proper for the purpose of carrying the provisions of this chapter into full force and effect. (June 17, 1902, c. 1093, Sec. 10, 32 Stat. 390; Aug. 13, 1914, c. 247, Sec. 15, 38 Stat. 690.)

* * * * *

SEC. 383. *Vested rights and State laws unaffected by chapter.*—Nothing in this chapter shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this chapter, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof. (June 17, 1902, c. 1093, Sec. 8, 32 Stat. 390.)

* * * * *

SEC. 391. *Establishment of "reclamation fund."*—All moneys received from the sale and disposal of public lands in Arizona, California, Colorado, Idaho, Kansas, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oklahoma, Oregon, South Dakota, Utah, Washington, and Wyoming, beginning with the fiscal year ending June 30, 1901, including the surplus of fees and commissions in excess of allowances to registers and receivers, and excepting the 5 per centum of the proceeds of the sales of public lands in the above

States set aside by law for educational and other purposes, shall be, and the same are hereby, reserved, set aside, and appropriated as a special fund in the Treasury to be known as the "reclamation fund", to be used in the examination and survey for and the construction and maintenance of irrigation works for the storage, diversion, and development of waters for the reclamation of arid and semiarid lands in the said States and Territories, and in the State of Texas, and for the payment of all other expenditures provided for in this chapter. (June 17, 1902, c. 1093, Sec. 1, 32 Stat. 388; June 12, 1906, c. 3288, 34 Stat. 259.)

* * * * *

SEC. 411. *Surveys for, location, and construction of irrigation works generally; reports to Congress.*—The Secretary of the Interior is authorized and directed to make examinations and surveys for, and to locate and construct, as provided in this chapter, irrigation works for the storage, diversion, and development of waters, including artesian wells, and to report to Congress at the beginning of each regular session as to the results of such examinations and surveys, giving estimates of cost of all contemplated works, the quantity and location of the lands which can be irrigated therefrom, and all facts relative to the practicability of each irrigation project; also the cost of works in process of construction as well as of those which have been completed (June 17, 1902, c. 1093, Sec. 2, 32 Stat. 388).

* * * * *

SEC. 421. *Acquisition of lands for irrigation project; eminent domain.*—Where, in carrying out

the provisions of this chapter it becomes necessary to acquire any rights or property, the Secretary of the Interior is authorized to acquire the same for the United States by purchase or by condemnation under judicial process, and to pay from the reclamation fund the sums which may be needed for that purpose, and it shall be the duty of the Attorney General of the United States upon every application of the Secretary of the Interior, under this chapter, to cause proceedings to be commenced for condemnation within thirty days from the receipt of the application at the Department of Justice (June 17, 1902, c. 1093, Sec. 7, 32 Stat. 389).

* * * * *

SEC. 479. *Shutting off water for nonpayment of construction charge.*—No water shall be delivered to the lands of any water-right applicant or entryman who shall be in arrears for more than one calendar year for the payment of any annual construction charge and penalties (Aug. 13, 1914, c. 247, Sec. 6, 38 Stat. 688).

SEC. 480. *Cancellation of water right or entry for nonpayment of construction charge.*—If any water-right applicant or entryman shall be one year in default in the payment of any installment of the construction charges and penalties, or any part thereof, his water-right application, and if he be a homestead entryman his entry also, shall be subject to cancellation, and all payments made by him forfeited to the reclamation fund, but no homestead entry shall be subject to contest because of such default (Aug. 13, 1914, c. 247, Sec. 3, 38 Stat. 687).

* * * * *

SEC. 495. *Shutting off water for nonpayment of operation charge.*—No water shall be delivered to the lands of any water-right applicant or entryman who shall be in arrears for more than one calendar year for the payment of any charge for operation and maintenance. (Aug. 13, 1914, c. 247, Sec. 6, 38 Stat. 688.)

SEC. 496. *Cancellation of entry or water right for nonpayment of operation charge.*—If any water-right applicant or entryman shall be one year in arrears in the payment of any charge for operation and maintenance and penalties, or any part thereof, his water-right application, and if he be a homestead entryman his entry also, shall be subject to cancellation, and all payments made by him forfeited to the reclamation fund, but no homestead entry shall be subject to contest because of such arrears. (Aug. 13, 1914, c. 247, Sec. 6, 38 Stat. 688.)

* * * * *

SEC. 521. *Sale of surplus waters generally.*—The Secretary of the Interior in connection with the operations under the reclamation law is authorized to enter into contract to supply water from any project irrigation system for other purposes than irrigation, upon such conditions of delivery, use, and payment as he may deem proper: *Provided,* That the approval of such contract by the water-users' association or associations shall have first been obtained: *Provided,* That no such contract shall be entered into except upon a showing that there is no other practicable source of water supply for the purpose: *Provided further,* That no water shall be furnished for the uses aforesaid if the de-

livery of such water shall be detrimental to the water service for such irrigation project, nor to the rights of any prior appropriator: *Provided further,* That the moneys derived from such contracts shall be covered into the reclamation fund and be placed to the credit of the project from which such water is supplied. (Feb. 25, 1920, c. 86, 41 Stat. 451.)

SEC. 522. *Lease of water power.*—Whenever a development of power is necessary for the irrigation of lands, under any project undertaken under the said reclamation law, or an opportunity is afforded for the development of power under any such project, the Secretary of the Interior is authorized to lease for a period not exceeding ten years, giving preference to municipal purposes, any surplus power or power privilege, and the moneys derived from such leases shall be covered into the reclamation fund and be placed to the credit of the project from which such power is derived: *Provided,* That no lease shall be made of such surplus power or power privileges as will impair the efficiency of the irrigation project: *Provided further,* That the Secretary of the Interior is authorized, in his discretion, to make such a lease in connection with Rio Grande project in Texas and New Mexico for a longer period not exceeding fifty years, with the approval of the water-users' asssociation or associations under any such project, organized in conformity with the rules and regulations prescribed by the Secretary of the Interior in pursuance of section 498 of this chapter (Apr. 16, 1906, c. 1631, Sec. 5, 34 Stat. 117; Feb. 24, 1911, c. 155, 36 Stat. 930).

SEC. 523. *Storage and transportation of water for irrigation districts, etc.*—Whenever in carrying out the provisions of the reclamation law, storage or carrying capacity has been or may be provided in excess of the requirements of the lands to be irrigated under any project, the Secretary of the Interior, preserving a first right to lands and entrymen under the project, is hereby authorized, upon such terms as he may determine to be just and equitable, to contract for the impounding, storage, and carriage of water to an extent not exceeding such excess capacity with irrigation systems operating under chapter 14 of this title, known as the Carey Act, and individuals, corporations, associations, and irrigation districts organized for or engaged in furnishing or in distributing water for irrigation. Water so impounded, stored, or carried under any such contract shall be for the purpose of distribution to individual water users by the party with whom the contract is made: *Provided, however,* That water so impounded, stored, or carried shall not be used otherwise than as prescribed by law as to lands held in private ownership within Government reclamation projects. In fixing the charges under any such contract for impounding, storing, or carrying water for any irrigation system, corporation, association, district, or individual, as herein provided, the Secretary shall take into consideration the cost of construction and maintenance of the reservoir by which such water is to be impounded or stored and the canal by which it is to be carried, and such charges shall be just and equitable as to water users under the Government project. No irrigation system, district,

association, corporation, or individual so contracting shall make any charge for the storage, carriage, or delivery of such water in excess of the charge paid to the United States except to such extent as may be reasonably necessary to cover cost of carriage and delivery of such water through their works. (Feb. 21, 1911, c. 141, Sec. 1, 36 Stat. 925.)

* * * * *

SEC. 661. *Appropriation of waters on public lands; right of way for canals and ditches.*—Whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals for the purposes herein specified is acknowledged and confirmed; but whenever any person, in the construction of any ditch or canal, injures or damages the possession of any settler on the public domain, the party committing such injury or damage shall be liable to the party injured for such injury or damage.

All patents granted, or preemption or homesteads allowed, shall be subject to any vested and accrued water rights, or rights to ditches and reservoirs used in connection with such water rights, as may have been acquired under or recognized by this section (R. S. Secs. 2339, 2340).

R. S. Sec. 2339 from Act July 26, 1866, c. 262, Sec. 9, 14 Stat. 253.

R. S. Sec. 2340 from Act July 9, 1870, c. 235, Sec. 17, 16 Stat. 218.

SEC. 7408. *Eminent domain by United States.*—The United States is hereby granted the right to exercise the power of eminent domain to acquire the right to the use of any water, to acquire or extinguish any rights, and to acquire any lands or other property, for the construction, operation, repairs to, maintenance or control of any plant or system of works for the storage, conveyance, or use of water for irrigation purposes, and whether such water, rights, lands or other property so to be acquired belong to any private party, association, corporation or to the state of Washington, or any municipality thereof; and such power of eminent domain shall be exercised under and by the same procedure as now is or may be hereafter provided by the law of this state for the exercise of the right of eminent domain by ordinary railroad corporations, except that the United States may exercise such right in the proper court of the United States as well as the proper state court (L. '05, p. 180, Sec. 1).

SEC. 7409. *Rights of United States to use watercourses.*—The United States shall have the right to turn into any natural or artificial watercourse, any water that it may have acquired the right to store, divert, or store and divert, and may again divert and reclaim said waters from said watercourse for irrigation purposes subject to existing rights (L. '05, p. 180, Sec. 2).

SEC. 7410. *Exemptions pending federal investigation.*—Whenever the secretary of the interior of the United States, or any officer of the United States duly authorized, shall notify the commis-

sioner of public lands of this state that pursuant to the provisions of the act of congress approved June 17, 1902, entitled, "An act appropriating the receipts from the sale and disposal of public lands in certain states and territories to the construction of irrigation works for the reclamation of arid lands", or any amendment of said act or substitute therefor, the United States intends to make examinations or surveys for the utilization of certain specified waters, the waters so described shall not thereafter be subject to appropriation under any law of this state for a period of one year from and after the date of the receipt of such notice by such commissioner of public lands; but such notice shall not in any wise affect the appropriation of any water theretofore in good faith initiated under any law of this state, but such appropriation may be completed in accordance with the law in the same manner and to the same extent as though such notice had not been given. No adverse claim to any such waters initiated subsequent to the receipt by the commissioner of public lands of such notice shall be recognized, under the laws of this state, except as to such amount of the waters described in such notice or certificate hereinafter provided as may be formally released in writing by a duly authorized officer of the United States. If the said secretary of the interior or other duly authorized officer of the United States shall, before the expiration of said period of one year, certify in writing to the said commissioner of public lands that the project contemplated in such notice appears to be feasible and that the investigation will be made in detail, the waters specified in such notice shall not be sub-

ject to appropriation under any law of this state for the further period of three years following the date of receipt of such certificate, and such further time as the commissioner of public lands may grant, upon application of the United States or some one of its authorized officers and notice thereof first published once in each week for four consecutive weeks in a newspaper published in the county where the works for the utilization of such waters are to be constructed, and if such works are to be in or extend into two or more counties, then for the same period in a newspaper in each of such counties: Provided, That in case such certificate shall not be filed with said commissioner of public lands within the period of one year herein limited therefor the waters specified in such notice shall, after the expiration of said period of one year, become unaffected by such notice and subject to appropriation as they would have been had such notice never been given: And provided further, that in case such certificate be filed within said one year and the United States does not authorize the construction of works for the utilization of such waters within said three years after the filing of said certificate, then the waters specified in such notice and certificate shall, after the expiration of said last named period of three years, become unaffected by such notice or certificate and subject to appropriation as they would have been had such notice never been given and such certificate never filed (L. '05, p. 180, Sec. 3).

SEC. 7411. *Appropriation—Title to beds and shores.*—Whenever said secretary of the interior or other duly authorized officer of the United States

shall cause to be let a contract for the construction of any irrigation works or any works for the storage of water for use in irrigation, or any portion or section thereof, for which the withdrawal has been effected as provided in section 7410, any authorized officer of the United States, either in the name of the United States or in such name as may be determined by the secretary of the interior, may appropriate, in behalf of the United States, so much of the unappropriated waters of the state as may be required for the project, or projects, for which water has been withdrawn or reserved under the preceding section of this act, including any and all divisions thereof, theretofore constructed, in whole or in part, by the United States or proposed to be thereafter constructed by the United States, such appropriation to be made, maintained and perfected in the same manner and to the same extent as though such appropriation had been made by a private person, corporation or association, except that the date of priority as to all rights under such appropriation in behalf of the United States shall relate back to the date of the first withdrawal or reservation of the waters so appropriated, and in case of filings on water previously withdrawn under said section 7410, no payment of fees will be required. Such appropriation by or on behalf of the United States shall inure to the United States, and its successors in interest, in the same manner and to the same extent as though said appropriation had been made by a private person, corporation or association. The title to the beds and shores of any navigable lake or stream utilized by the construction of any reservoir or

other irrigation works created or constructed as a part of such appropriation hereinbefore in this section provided for, shall vest in the United States to the extent necessary for the maintenance, operation and control of such reservoir or other irrigation works (L. '29, p. 183, Sec. 1. Cf. L. '05, p. 182, Sec. 4).

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In the Supreme Court of the United States

OCTOBER TERM, 1936

No. 266

HAROLD L. ICKES, SECRETARY OF THE INTERIOR, PETITIONER

v.

MAZINE Z. FOX ET AL.

No. 267

HAROLD L. ICKES, SECRETARY OF THE INTERIOR, PETITIONER

v.

PHILLIP LOUIS PARKS ET AL.

No. 268

HAROLD L. ICKES, SECRETARY OF THE INTERIOR, PETITIONER

v.

JACOB F. OTTMULLER

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR HAROLD L. ICKES, SECRETARY OF THE INTERIOR

OPINIONS BELOW

The Supreme Court of the District of Columbia filed a memorandum opinion relating to the mo-

tions for leave to file amended bills of complaint (Fox R. 30; Parks R. 23; and Ottmuller R. 23), which was in effect adopted in the memorandum opinion on the motions to dismiss (Fox R. 50; Parks R. 40; Ottmuller R. 47). The opinion of the United States Court of Appeals for the District of Columbia (Fox R. 55; Parks R. 44; Ottmuller R. 51) is reported in 85 F. (2d) 294.

JURISDICTION

The judgments of the Court of Appeals were entered on June 8, 1936 (Fox R. 62; Parks R. 52; Ottmuller R. 59). The petition for writs of certiorari was filed on August 7, 1936 and was granted on October 12, 1936 (Fox R. 64; Parks R. 52; Ottmuller R. 59). The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED[1]

Whether the United States is an indispensable party defendant in these suits, brought to compel the Secretary of the Interior to restore respondents to their alleged rights to receive larger amounts of water from the Yakima Irrigation Project than in terms provided by their water right contracts with the United States.

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[1] The petition for certiorari set forth a second question, relating to the basis of equity jurisdiction, which the Government now believes unnecessary to argue.

STATUTES INVOLVED

The pertinent provisions of the Federal reclamation law and of the statutes of the State of Washington are set forth in the Appendix (*infra*, pp. 34–38).

STATEMENT

These were three special appeals to the United States Court of Appeals for the District of Columbia by the Secretary of the Interior, Harold L. Ickes, from orders of the Supreme Court of the District of Columbia which denied his motions to dismiss amended bills in equity brought, in the language of the bills, to require him to vacate certain notices and orders relating to the Sunnyside Unit of the Yakima Project, a Federal reclamation project in the State of Washington, and to restore respondents "to the rights and privileges which they enjoyed prior to the promulgation of said notices and orders" (Fox R. 41; Parks R. 33; Ottmuller R. 34). The effect of this prayer seems to be that respondents seek an order compelling the Secretary of the Interior to deliver the amount of water which had been delivered prior to these notices. The three cases have, for purposes of argument, been consolidated in both the lower courts.

Pursuant to the Reclamation Law (U. S. C., Title 43, c. 12) and applicable statutes of the State of Washington (8 Remington's Rev. Stat. §§ 7408–7415), the United States in 1906 undertook the construction and operation of the Yakima Project and

in connection therewith purchased from the Washington Irrigation Company, a Washington corporation, the Sunnyside canal, water appropriations, and irrigation system used in connection therewith (Fox R. 32; Parks R. 25; Ottmuller R. 25). The United States also made water appropriations from the Yakima River system and provided storage for these appropriated waters in reservoirs constructed, owned and operated by the United States (U. S. C., Title 43, Sec. 498, *infra*, p. 35) as expressly authorized by the laws of Washington (Remington's Rev. Stat. §§ 7408, *et seq.*, *infra*, p. 36.)

The owners of the lands, within the Sunnyside Unit of the Yakima Project and now held by the respondents, executed water-right applications and contracts and delivered them to the United States. By virtue of these water-right applications and contracts, respondents' predecessors became entitled to receive designated amounts of water from the United States under specified conditions.

In the *Fox* case the measure of the water right purchased by respondents' predecessors in title is stated in the several applications (R. 17, 20, 24) to be:

> The measure of the water right for said land is that quantity of water which shall be beneficially used for the irrigation thereof, but in no case exceeding the share proportionate to irrigable acreage, of the water sup-

> ply actually available as determined by the project manager or other proper officer of the United States, or of its successors in the control of the project, during the irrigation season for the irrigation of lands under said unit.

Respondents allege that the water right acquired under this language entitles them to 4.84 acre-feet of water per acre per annum (R. 34–35).

In the *Parks* case the measure of the supplemental water right purchased by respondents' predecessors in title is fixed in the water-right contract (R. 17) as:

> The amount of water to be furnished hereunder shall be three acre-feet of water per annum per acre measured at the land, or as much more water as will be required to successfully irrigate the land, the amount so required to be determined by the authorized agent of the United States, and the water shall be used only to irrigate said lands and for domestic purposes incident thereto; provided, that the amount of water furnished shall be limited to the amount beneficially used upon such lands.

Respondents allege that the water right acquired entitled them to 6 acre-feet of water per acre per annum (R. 26–27).

In the *Ottmuller* case the measure of the water right purchase by respondent's predecessors in

title is stated in the water-right application (R. 37) as follows:

> The quantity of water to be furnished hereunder shall be 3 acre-feet of water per annum per acre of irrigable land, as aforesaid, measured at the land; or so much thereof as shall constitute the proportionate share per acre from the water supply actually available for the lands under said project; provided, that the supply furnished shall be limited to the amount of water beneficially used on said irrigable land;

Respondent alleges that the water right acquired by virtue of this language entitles him to 5.56 acre-feet of water per acre per annum (R. 27–28).

On October 17, 1930, the Assistant Secretary of the Interior issued a public notice which pointed out that, while it had previously been possible to allow to the water users of the Sunnyside Unit the temporary use of water in excess of the amounts specified in their respective contracts and water applications, it had now become necessary, by reason of the completion of the Kittitas Division of the Yakima project, to limit deliveries in the Sunnyside Unit to the amounts actually specified in the contracts and applications relating to lands in that unit (Fox R. 46–47; Parks R. 36–37; Ottmuller R. 43–44). Pursuant to this notice and, in the Parks case, a later notice of May 5, 1932 (Parks R. 38–39), respondents were limited to substantially smaller amounts of water than they had there-

tofore received. Fox (R. 37) and Ottmuller (R. 30) were limited to 3 acre-feet and Parks (R. 29) to 3.5 acre-feet. The notice stated that water in excess of these amounts, which might be required by such users, would be available at a stated water rental.

The bills originally filed by respondents were dismissed on the Secretary's motion because "In each of these cases the bill seeks to compel the defendant to carry out an [executory] contract of the United States." (Fox R. 29; Parks R. 21; Ottmuller R. 22.)

Respondents were then granted leave to file amended bills (Fox R. 31; Parks R. 23; Ottmuller R. 24), in which they allege that the notices and orders of the Secretary, of which the 1930 notice mentioned above is the basic one, are arbitrary and in excess of authority, and pray that the Secretary of the Interior be ordered to vacate these orders and notices, and that he be further ordered to restore respondents to their former rights (Fox R. 41; Parks R. 33; Ottmuller R. 34). Petitioner moved to dismiss because the United States was a necessary party in that, among other things, the bills sought specific performance of contracts of the United States and would affect the interest of the United States in its property. (Fox R. 49–50; Parks R. 39; Ottmuller R. 46). The motion was denied for the reasons which led the trial judge to allow the amended bills to be filed (Fox R. 50;

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Parks R. 40; Ottmuller R. 47). These, as stated in his memoranda (Fox R. 30; Parks R. 23, Ottmuller R. 23), were:

> It appears from the proposed amended bills that the orders made by the defendant are not authorized by Congress, and had they been so authorized, would have deprived the plaintiffs of vested rights. The suits are not brought against the United States but to set aside unauthorized acts of the defendant in cases in which he has no discretionary powers, and is acting arbitrarily.

Petitioner petitioned the Court of Appeals for a special appeal under the Act of February 9, 1893 (c. 74, 27 Stat. 434, 436), which was granted (Fox R. 51; Parks R. 41; Ottmuller R. 48). The decision of the trial court was affirmed, Judge Stephens dissenting[2] (Fox R. 55–62).

SPECIFICATION OF ERRORS TO BE URGED

The United States Court of Appeals for the District of Columbia erred:

1. In holding that the Supreme Court of the District of Columbia had jurisdiction to entertain these suits, in substance and effect suits to compel specific performance of contracts to which the United States is a party and to affect property in which it has an interest.

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[2] The Court of Appeals delivered one opinion, covering all three cases. References will be made to the *Fox* record.

2. In holding that the present suits do not seek in substance and effect specific performance of contracts to which the United States is a party.

3. In holding that the United States was not an indispensable party defendant in these suits.

4. In failing to hold that the amended bills of complaint and the exhibits attached thereto and made a part thereof show that the suits were brought on contracts to which the United States is a party, and that the decree prayed for would affect the interests of the United States in said contracts and the property of the United States, and that consequently the court was without jurisdiction.

5. In affirming the judgment of the Supreme Court of the District of Columbia, denying the petitioner's motions to dismiss the amended bills of complaint.

SUMMARY OF ARGUMENT

The United States is an indispensable party defendant to these suits, whether respondents' claims be viewed as based on contracts with the United States or as resting on alleged property rights asserted contrary to the claims of the United States.

If the bills are based on contracts with the United States, it is therefore an indispensable party defendant which has not consented to be sued in this manner, and they must be dismissed. *Wells* v. *Roper*, 246 U. S. 335; *Goltra* v. *Weeks*, 271 U. S.

536. The bills are obviously based on rights claimed under contracts with the United States, unless petitioner succeeds in showing a property right in the water independent of these contracts. It is plain under the statutes and decisions of Washington which govern the appropriation of the water now in question that the United States, in storing and distributing the water, is the sole owner and appropriator of the water and that the respondents have no right to the water apart from the contract obligations of the United States.

In any event, the court below and the respondents base their argument that these are not suits on the contracts with the United States on the ground that respondents have a property right in the water independent of the contracts with the United States. This claim is asserted in opposition to the claim of the United States to full ownership of the water, which is in its possession. Thus the plea for jurisdiction is self-defeating, in that it rests upon a request that the court determine the title adversely to the United States, which is thus an indispensable party defendant. *Goldberg* v. *Daniels,* 231 U. S. 218; cf. *Arizona* v. *California,* No. —, Orig., October Term, 1935.

ARGUMENT

THE UNITED STATES IS AN INDISPENSABLE PARTY DEFENDANT

These suits seek relief against the petitioner which amounts to a mandatory injunction that the petitioner deliver to the respondents the same amount of water as was delivered prior to the completion of another division of the Yakima reclamation project. (See Fox R. 41; Parks R. 33; Ottmuller R. 34.) Respondents seek to convert into a vested right the privilege of receiving more water than specified in their contracts, irrespective of the needs of other lands dependent upon the Yakima Project for their irrigation. See Public Notice of October 17, 1930, explaining the reasons for restricting water deliveries to the contract terms[3] (Fox R. 46–47; Parks R. 36–37; Ottmuller R. 43–44).

The Government submits that these suits must fail because the lower courts had no jurisdiction to entertain them. (1) Respondents have, we believe, no rights whatever apart from their contracts with the United States. (2) In asserting a property right in the water, respondents lay claim to prop-

[3] This Public Notice indicates that the water to be furnished under its terms is sufficient, with economical use, to irrigate respondents' lands; respondents, on the other hand, allege that it is wholly insufficient (Fox R. 38; Parks R. 30; Ottmuller R. 31).

erty claimed by and in the possession of the United States. By either of these analyses it is quite clear that the United States is an indispensable party defendant and that the bills must accordingly be dismissed.

1. The Suits are Based Solely on Contracts with the United States

If the United States was the appropriator and is the owner of the water rights in question, the respondents can have no claim apart from their contracts with the United States. It would necessarily follow that the suits were brought on contracts with the United States and that the motions to dismiss the bills should have been granted. If the rights claimed arise under contracts with the United States, the suits are in effect brought against the United States, which is thus an indispensable party defendant who has neither been joined nor has consented to be sued in this manner. *Wells* v. *Roper,* 246 U. S. 335; *Transcontinental & Western Air* v. *Farley,* 71 F. (2d) 288 (C. C. A. 2d), certiorari denied, 293 U. S. 603. In addition the relief sought would be the substantial equivalent of specific performance of a contract with the United States, which no court has jurisdiction to award. *Goltra* v. *Weeks,* 271 U. S. 536, 546; *United States ex rel. Shoshone Irrigation District* v. *Ickes,* 70 F. (2d) 770, 773 (App. D. C.), certiorari denied, 293 U. S.

571; *Boeing Air Transport* v. *Farley,* 75 F. (2d) 765 (App. D. C.), certiorari denied, 294 U. S. 728.

The court below held that these suits were not based upon respondents' contracts with the United States but were merely brought to enjoin the enforcement of an illegal order (Fox R. 59–60). This decision is necessarily grounded on the holding (Fox R. 60) that the respondents have appropriated the water and applied it to a beneficial use, and accordingly have title to and a vested right in the water independently of their contracts with the United States. Respondents make the same argument (Br. in Opp. 21–24). The Government submits that this position is plainly contrary to the applicable law.

The amended bills of complaint set forth that the Secretary of Interior approved the Sunnyside unit of the Yakima project in 1906 (Fox R. 32; Parks R. 25; Ottmuller R. 25). The United States obtained the water for irrigation of the lands in this unit in two manners: it purchased the appropriations of the Washington Irrigation Company (Fox R. 32; Parks R. 25; Ottmuller R. 25) and it constructed additional reservoirs in which it stored the surplus water of the Yakima River (Fox R. 35; Parks R. 26–27; Ottmuller R. 27). At the time this project was commenced the lands of two of the respondents were "arid and unproductive", although they were "susceptible to irrigation" (Fox R. 32; Ottmuller R. 25). The land of the third respond-

ent, at least since 1903, had been irrigated by water "acquired by purchase from the Washington Irrigation Company, the then owners of the Sunnyside Canal and water appropriations from the Yakima River" (Parks R. 24–25). It is plain that none of the respondents has himself actually diverted water from the river, that in the case of two of them the water has been received only pursuant to the contracts made with the United States, and that the third has used water acquired only under contracts first with the Washington Irrigation Company and then with the United States.[4]

Whether these circumstances give the respondents any sort of a property right in the water must be determined in the light of state law, to which the reclamation activities of the Federal Government are expressly made subject. (Act of June 17, 1902, *infra*, p. 34.) The basic inquiry is

[4] The Court of Appeals states in its opinion (Fox R. 56) that respondents base their claims "primarily on the rights acquired by them or their predecessors by purchase from the Washington Irrigation Company." We do not understand respondents so to claim. In any event this statement is not warranted upon the records in these cases. As applied to respondents Fox and to respondent Ottmuller, it finds no possible support in the record; they obtained water only under contracts with the United States. The bill of complaint in the *Parks* case asserts that prior to the initiation of the Yakima project the then owners of the land involved in that case purchased a water right for their land and "that after said purchase there was actually furnished * * * six acre-feet of water" (R. 25). It is significant that the bill does not allege that the *purchase* was of such an amount of water. On the contrary, the original bill alleged that the Washington Irrigation Company water right "was equivalent to 2.62 acre-feet" (R. 2).

whether the mere use of water supplied under contract with the operator of a storage and irrigation system is sufficient to give title to the water independently of the contract. The court below and the respondents have confused this inquiry by their failure to consider the law of the State in which, and the date at which, the rights are said to have accrued.

Some of the arid States, by statute or by decision, have modified the doctrine of first appropriation to require that there be actual beneficial use by the appropriator. See *Wiel,* Water Rights in the Western States, II, *c.* 57, pp. 1235–1248 (3rd Ed.). Colorado seems to have gone farther in this direction than has any other State. Under the law of that State, the fact of storage and distribution does not constitute appropriaion, but merely makes the carrier of the water a trustee for the consumer, in whom the property right rests. *Highland Ditch Co.* v. *Union Reservoir Co.,* 53 Colo. 483; *Pioneer Irrigation Co.* v. *Board of Commissioners,* 236 Fed. 790, 792 (D. Colo.). These were the only cases cited by the court below to support its holding that respondents, rather than the United States, were the appropriators and owners of the water in question.

This case, however, involves the law of Washington rather than that of Colorado. It is therefore unnecessary to consider whether the Colorado doctrine is applicable to irrigation projects operated by the United States, for it is quite clear, under the applicable Washington law, that the one who di-

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verts water for sale or distribution to others has made a full appropriation and has full title to the water.

Prior to 1917, the appropriation of water was governed by the Act of 1891 (Laws 1891, p. 327, Sec. 1; 2 Remington's 1915 Code, Sec. 6316) which provided:

> The right to the use of water in any lake, pond, or flowing spring in this state, or the right to the use of water flowing in any river, stream, or ravine of this state, for irrigation, mining, or manufacturing purposes, or for supplying cities, towns, or villages with water, or for waterworks, may be acquired by appropriation, and as between appropriations, the first in time is the first in right.

It is thoroughly settled under this Act that the one who impounds water in a reservoir and distributes it under contract with the agricultural users is the appropriator, and that those who contract with him gain no property rights in the water from its use but have merely their contract rights against the distributor. In *Lanham* v. *Wenatchee Canal Co.*, 48 Wash. 337, the court held that a parol license by which the landowner had for several years taken water from an uphill ditch gave him no rights beyond his contract, limiting his water to the main canal, which was down-hill. In *Shafford* v. *White Bluffs Co.*, 63 Wash. 10, the court sustained the power of the distributor to inaugurate the practice of delivery on alternate days instead of continuously; the decision was based solely

upon construction of the contract. In *Black* v. *Baker,* 126 Wash. 604, the court held that a contract to deliver water, in return for a lump-sum consideration, was not enforceable against a successor corporation which took over the distribution system upon the insolvency of the contracting distributor. Other cases have assumed as a matter of course that the remedy for failure to supply the agreed water is one for breach of contract, or for its specific enforcement. *State ex rel. Krutz* v. *Washington Irrigation Co.,* 41 Wash. 283; *Lombard* v. *Schlotfeldt,* 68 Wash. 518; *Hotchkin* v. *Wenatchee Heights Orchard Co.,* 75 Wash. 361; *Huschke* v. *Arcadia Orchards Co.,* 89 Wash. 423; *McDonald* v. *Prosser Falls Land & Power Co.,* 110 Wash. 175; *Hill* v. *Selah & Moxee Irrigation District,* 139 Wash. 120; *Talbott* v. *Whitestone Reclamation District,* 154 Wash. 102. In *Duns-muir* v. *Port Angeles Gas Co.,* 24 Wash. 104, 114, the court said, by way of dictum:

> While it is true that water in a running stream is deemed in law a part of the land over which it flows, it is also true that, after it has been diverted from its original channel and conveyed elsewhere in pipes for distribution or sale, it loses its original character and becomes personal property.

Compare *Methow Cattle Co.* v. *Williams,* 64 Wash. 457, 460. See also *Wiel, supra,* Secs. 35, 36.

In this state of the law, it is plain that the United States is the appropriator of the water and that the respondents have no title to the water but

merely contract rights against the United States. Two federal courts have held, in regard to this very Yakima project, that the United States is the appropriator of the water distributed to the landowners. In *United States* v. *Union Gap Irrigation Co.*, 209 Fed. 274, 276 (E. D. Wash.), the court said:

> The right of the plaintiff to maintain this suit is beyond question. Aside from any rights it may have acquired under the legislative act of 1905, it acquired by purchase from the Washington Irrigation Company, on the 23d day of June, 1906, the Sunnyside Canal, having its intake below Union Gap in Yakima county, together with an appropriation of 1,000 cubic feet of water per second of time, made by the Northern Pacific, Yakima & Kittitas Irrigation Company on the 22d day of April, 1891, and it has a manifest right to protect this appropriation and the rights acquired thereunder by injunction.

The Circuit Court of Appeals for the Ninth Circuit reached an identical result in *West Side Irrigation Co.* v. *United States*, 246 Fed. 212, 217, where it said:

> Also without merit is the contention that the United States has no authority to maintain the suit. The United States, according to the allegations of the complaint,[5] is an ap-

[5] The decision cannot be explained away as resting upon admissions of fact by the defendants. The appeal was taken after final decree, not from action on a motion to dismiss. The court, in apparently treating appropriation as a question of fact, necessarily decided that the facts of storage, diversion, and distribution amounted in law to an appropriation.

> propriator of water, and a purchaser of other appropriations of water from the Yakima river for use in irrigation projects, and it clearly has the right to protect, not only those interests, but also the whole project and scheme of reclamation which it has undertaken under the authority of Congress by the act of June 17, 1902, known as the Reclamation Act.

The cases are numerous which reflect the general doctrine that construction and operation of a reservoir and distribution system constitutes an appropriation of the water sold under contract for irrigation purposes. See *Kinney,* Irrigation and Water Rights, II, Secs. 703, 704. This Court has on several occasions applied this principle. In *San Joaquin Co.* v. *Stanislaus County,* 233 U. S. 454, this Court held that the distributor had a property right in the water so appropriated which was protected by the Federal Constitution. In *Gutierres* v. *Albuquerque Land Co.,* 188 U. S. 545, 555–556, the Court held that there was nothing in the Desert Land Act to prevent the operation of a local statute permitting appropriation for sale, and that the beneficial use need not be made directly by the appropriator.

If there were any doubt that the United States, rather than the respondents, is the appropriator of this water, it would be set at rest by the Washington statute authorizing appropriations of water for Federal reclamation projects. The Act of March 4, 1905 (Laws 1905, c. 88, p. 180) gave to the United

States a general power to make use of water, and exercise the power of eminent domain in aid of these projects. In Section 4 it provided that any authorized officer of the United States "may appropriate, in behalf of the United States, so much of the unappropriated waters of the state as may be required for the project." (8 Remington's Rev. Stat. sec. 7411, *infra*, p. 36). This Act makes it plain that the legislature contemplated that the United States, and not the landowners with whom it contracts, was to be considered the appropriator and owner of the stored waters.

THE CONSIDERATIONS RELIED UPON BY THE COURT BELOW

1. Both the court below (Fox R. 57) and the respondents (Br. in Opp. 12, 16, 26) are of the opinion that Section 8 of the Reclamation Act (43 U. S. C. 372, *infra*, p. 34) makes inapplicable the doctrine that storage and distribution of the water constitutes full appropriation and gives full title. That section, after providing that appropriations should be made under state law, adds the following proviso:

> The right to the use of the water acquired under the provisions of the reclamation law shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right.

It may be conceded that this language would offer support to respondents if it were plainly directed toward the relationship between the landowners and the United States. However, its legis-

lative history makes perfectly clear that it was designed only to prevent speculative profits by forbidding alienation of the water right for use on other lands or for other purposes. The House Committee on Irrigation of Arid Lands,[6] in reporting the bill favorably, said (H. Rpt. No. 1468, 57th Cong., 1st Sess., p. 7):

> * * * In order that the water rights acquired under the provisions of the act shall be of the character most approved by centuries of irrigation practice, and such as will absolutely insure the user in his right and prevent the possibility of speculative use of water rights, the character of the right which is contemplated under the act is clearly defined to be that of appurtenance or inseparability from the lands irrigated and founded on and limited by beneficial use.

Senator Hansbrough, in charge of the bill, put the matter more graphically on the floor of the Senate (35 Cong. Rec. 1385):

> * * * under existing land laws, sources of water supply are being seized upon with great rapidity, largely by men who are not able to utilize them and who are holding them for speculative purposes. For example, a man may secure control of a spring or locality where water might be held to irrigate 10,000 acres. He holds this for his cattle or for raising forage. He has not the

[6] The Senate report merely paraphrased the provision without comment. Sen. Rpt. No. 254, 57th Cong., 1st Sess., p. 2.

> means to conserve the water, nor could he do this profitably * * * and so these public lands around him lie idle.
>
> There are thousands of such instances. In one way or another control of the situation is rapidly passing away from the people, and vested rights are growing up.

Congressman Mondell, in charge of the bill, described this proviso on the floor of the House (35 Cong. Rec. 6679):

> * * * These most important provisions of the law prevent all the evils which come from recognizing a property right in water with power to sell and dispose of the same elsewhere and for other purposes than originally intended.

This Court has held that under the Reclamation Act the United States is the appropriator of the water which it distributes under irrigation contracts.[7] In *Ide* v. *United States,* 263 U. S. 497, it upheld the power of the United States to enjoin users from interfering with attempts to recover seepage water, escaping from lands irrigated through the Shoshone project. The decision was that the ownership and control of the water by the United States was such that, even after "sale" to landowners, it had power to recover the seepage

[7] In this connection the law of the State is immaterial. If Section 8 of the Reclamation Act has the force ascribed to it by the court below, it would give title in the water to the landowner whatever the applicable State law (and notwithstanding the express provision that the law of the State should govern).

water against the claims of others who were actually using this water.[8] The Court said (pp. 505–506):

> The seepage producing the artificial flow is part of the water which the plaintiff, *in virtue of its appropriation,* takes from the Shoshone River and conducts to the project lands in the vicinity of the ravine for use in their irrigation. The defendants insist that when water is once used under the appropriation it cannot be used again,—that the right to use it is exhausted. *But we perceive no ground for thinking the appropriation is thus restricted. According to the record it is intended to cover, and does cover, the reclamation and cultivation of all the lands within the project.* A second use in accomplishing that object is as much within the scope of the appropriation as a first use is.
>
> * * * * *
>
> A further contention is that the plaintiff sells the water before it is used, and therefore has no right in the seepage. *But the water is not sold.* In disposing of the lands in small parcels, the plaintiff invests each purchaser with a right to have enough water supplied from the project canals to irrigate his land, but it does not give up all control over the water or to do more than pass to the purchaser a right to use the water so far as may be necessary in properly cultivating

[8] While appellant in that case did not argue that this proviso has the effect given to it in this case by the court below, he did rely on the first part of Section 8 and set out the entire section, including the proviso, in his argument. See Brief for Appellant, p. 26, No. 37, October Term, 1923.

his land. *Beyond this all rights incident to the appropriation are retained by the plaintiff.* (Italics added.)

2. The court below emphasized that the Reclamation Extension Act of August 13, 1914 (Sec. 4, c. 247, 38 Stat. 687; 43 U. S. C. 469) provided that "no increase in the construction charges shall * * * be made, after the same have been fixed by public notice, except by agreement between the Secretary of the Interior and a majority of the water-right applicants and entry men to be affected by such increase." (Fox R. 61.) It did not explain the relevance of this provision, but the implication appears to be that the Public Notice of February 19, 1932, restricting delivery to three or three and one-half acre-feet, except on payment of additional amounts (Fox R. 48; Ottmuller R. 45), amounted to an additional construction charge. Respondents argue that this statutory provision demonstrates the illegality of the public notice (Br. in Opp. 19).

But the statutory prohibition against increasing construction charges has no meaning apart from the contracts in which the original charges were fixed. To argue that the construction charges have in this manner been increased necessarily involves as a premise the assertion that the larger amount of water was promised by the contracts under which the original construction charges were paid. It is impossible to say that the construction charges have been increased if the original charges were to cover no more water than the three or three and one-half feet now being delivered without addi-

tional charge. Therefore, in making this argument, respondents in effect argue that the United States has not fulfilled the obligations of its contracts and thus appear to concede that the sole question is whether or not the United States has breached the obligations of its contracts.[9]

[9] While immaterial here, it might be noted in passing that the allegations of the bills do not show a breach of the contracts. It is plain that the orders here attacked cannot be argued to be a breach of the Ottmuller contract, which specifies a maximum delivery of 3 acre-feet (R. 37). It appears probable that there has been no breach of the other contracts. The Fox application calls for the "quantity of water which shall be beneficially used for the irrigation thereof, but in no case exceeding the share proportionate to irrigable acreage, of the water supply actually available as determined by the project manager or other proper officer of the United States" (R. 17, 20, 24). The Parks contract calls for 3 acre-feet "or as much more water as will be required to successfully irrigate the land, the amount so required to be determined by the authorized agent of the United States" (R. 17). The public notice of October 17, 1930, states that the determination referred to in contracts such as that of Parks was to be made in 1931 (Fox R. 47; Parks R. 37). The Parks bill indicates that the apparent result of this determination was to fix the necessary quantity of water at the amounts now being delivered without additional charge (R. 38). Plainly in the case of Parks, and probably in the case of Fox, the determination must be made by an officer of the United States, so the allegations of respondents (Fox R. 38; Parks R. 30), that the water now furnished is insufficient, are immaterial. The general duty of water upon the Sunnyside Division of the Yakima Project has been fixed at 3 acre-feet from the inception of the project. (See 7th Annual Report of the Reclamation Service (1908), p. 191; 8th *id.* 195; 9th *id.* 288; 10th *id.* 229; 11th *id.* 182; 12th *id.* 227; 13th *id.* 293; 14th *id.* 291; 15th *id.* 445; 16th *id.* 314; 17th *id.* 338; 18th *id.* 343; 19th *id.* 367; 20th *id.* 346; 21st *id.* 110; 22d *id.* 114; 23d *id.* 75; 24th *id.* 99; 25th *id.* 79.)

3. In 1917 the Washington legislature enacted a new Water Code. Laws of 1917, c. 117, p. 447; 8 Remington's Rev. Stats. Secs. 7351 *et seq.* In Section 1 it was provided that waters thereafter should be acquired "only by appropriation for a beneficial use." (8 Remington, Sec. 7351 *infra*, p. 35.) In Section 39 it was provided that "The right to the use of water which has been applied to a beneficial use in the state shall be and remain appurtenant to the land or place upon which the same is used." (8 Remington Sec. 7391.) Respondents argue that these provisions give them a property in the water used on their land and make their claims independent of their contracts with the United States (Br. in Opp. 10, 12, 16, 21). The court below seems by implication to have adopted the same view (Fox R. 60).

It is doubtful that these provisions have the force ascribed to them by respondents.[10] The Supreme Court of Washington has on two occasions considered, in the light of the 1917 Code, disputes between a landowner and the water distributor. In each case its emphasis was placed entirely upon the contract between the parties and neither case contains any indication that the landowner had acquired property rights in the water apart from the contract. *Madison* v. *McNeal*, 171 Wash. 669; *Wenatchee Reclamation District* v. *Titchenal*, 175

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[10] Compare the legislative history of the substantially similar provision in the Reclamation Act, *supra*, pp. 21–22.

Wash. 398. In the latter case the court said (pp. 403–404):

> * * * if the land owner here had title to the appurtenant water, that title must be a limited one, to be enjoyed only according to its limitations, and those limitations, of course, are to be determined by the terms of the contract.

But it is immaterial here whether or not the 1917 Code justifies respondents' interpretation. The water rights in question were appropriated in 1906 or before and there does not seem to be any serious question but that the United States, rather than the landowners, was the appropriator and owner under the older law. Section 1 of the 1917 Code expressly provides:

> Nothing contained in this act shall be construed to lessen, enlarge, or modify the existing rights of any riparian owner, or any existing right acquired by appropriation, or otherwise.

The very clause of Section 1 relied upon by respondents provides that "*subject to existing rights*" all waters belong to the public and may be acquired only by appropriation for a beneficial use. It is plain that the 1917 Code cannot serve to qualify the full rights which the United States acquired prior to its passage.

2. *The Suits Relate to Property Interests of the United States*

The court below held that these claims were not based on the contracts with the United States be-

cause respondents sought merely to protect their property rights in the water against the enforcement of the illegal order. (Fox R. 59–60.) This seems also to be the position of the respondents. (Br. in Opp. 11–12, 19–23.) Indeed, the suits must necessarily be held to have been brought on contracts with the United States unless the respondents succeed in showing a property right, wholly independent of these contracts, which has allegedly been invaded.

The Government believes that it has demonstrated that this premise of the decision below is wholly erroneous. It seems clear that respondents have no claim whatever save that which rests upon the contracts with the United States, the sole appropriator and owner of the water rights in question.

However this may be, the point now to be emphasized is that respondents' claim of jurisdiction in the courts below is necessarily based upon an alleged property right which is asserted in opposition to the claim of the United States.[11] The necessary foundation of the bills may be paraphrased as the allegation that the Secretary of the Interior

[11] Each of the bills alleges that "absolute title in fee simple of 4.84 [or 6 or 5.56] acre-feet of water per acre per annum became and is now vested in the plaintiff[s]." (Fox R. 34–35; Parks R. 26; Ottmuller R. 27.) The public notices, attached as exhibits to the bills, make it clear that the Government officials view the water as owned by the United States and the rights of the landowners as purely contractual. (Fox R. 46–49; Parks R. 36–39; Ottmuller R. 43–46.)

threatens to interfere with the respondents' water rights which are owned independently of the contracts by which the United States agrees to furnish the water. To decide if the United States is a necessary party, when it is objected that these are suits on contracts of the United States, it is accordingly necessary to decide whether the water rights are owned by the United States or by the respondents. Thus, the very claim that the United States is not a necessary party rests upon a request that the court adjudicate that the claim of the United States to ownership of the water must fall before the claims of the respondents. It is plain that such a plea for jurisdiction is self-defeating, in that the court can grant it only by making a preliminary decision as to the ownership of property in the possession of and claimed by the United States, which is therefore an indispensable party defendant.

Such was the decision of the Circuit Court of Appeals for the Ninth Circuit in *American Falls Reservoir District No. 2* v. *Crandall,* 82 F. (2d) 973 (rehearing denied, September 28, 1936). There the plaintiff sought an adjudication, under Idaho procedure, of its natural-flow water rights. These rights were asserted under Article XV, Section 4 of the Idaho constitution, roviding that no landowner should without his consent be deprived of the annual use of water rights used for agricultural purposes "under a sale, rental or distribution." The Reclamation officials were made

parties defendant and moved to dismiss because the United States was an indispensable party defendant. The court did not touch upon the effect of the contract between the plaintiff and the United States but dismissed the bill because the suit could be maintained only if the plaintiff were declared to have a property right opposed to the claim of the United States. It said (p. 978):

> Of course, it could be considered that appellant has acquired a vested right, and is merely attempting to require the Secretary to proceed in conformity with the constitutional provisions hereinabove quoted. However, it seems to us that the nub of the question would be, first, whether or not appellant has acquired a vested right, and to determine in favor of appellant on such a question would be depriving the United States of its property right (claimed by appellant in this suit) without giving the United States an opportunity to defend the suit. This we cannot do; therefore we hold that the suit should have been dismissed on that ground. We pass, as not needing discussion, the other grounds urged for a dismissal.

It seems self-evident, in the *Crandall* case and in the case at bar, that both the relief asked and the basis of jurisdiction sought to be invoked involve a decision as to the ownership of property claimed by the United States. It necessarily follows that the courts below were without jurisdiction. As this Court declared in *Goldberg* v. *Daniels,* 231 U. S. 218, 221–222:

> The United States is the owner in possession of the vessel. It cannot be interfered with behind its back and, as it cannot be made a party, this suit must fail. *Belknap* v. *Schild,* 161 U. S. 10. *International Postal Supply Co.* v. *Bruce,* 194 U. S. 601, 606. *Oregon* v. *Hitchcock,* 202 U. S. 60, 69. *Naganab* v. *Hitchcock,* 202 U. S. 473, 476.

This Court has recently dealt with an analogous situation in *Arizona* v. *California,* No. —, Orig., October Term, 1935. There the Court was speaking of the interest of the United States in the control of navigable waters, but its decision is fully applicable to the control of waters appropriated and owned for the purposes of an irrigation project. This Court held (pamphlet, pp. 10–11):

> Every right which Arizona asserts is so subordinate to and dependent upon the rights and the exercise of an authority asserted by the United States that no final determination of the one can be made without a determination of the extent of the other. Although no decree rendered in its absence can bind or affect the United States, that fact is not an inducement for this Court to decide the rights of the states which are before it by a decree which, because of the absence of the United States, could have no finality. *California* v. *Southern Pacific Co.,* 157 U. S. 229, 251, 257; *Minnesota* v. *Northern Securities Co.,* 184 U. S. 199, 235, 245–247); *International Postal Supply Co.* v. *Bruce,* 194 U. S. 601, 606; *Texas* v. *Inter-*

state Commerce Commission, 258 U. S. 158, 163.

These suits not only seek to establish a property right in the water in opposition to the claim of the United States, but also seek to interfere with the operation and management of the reservoirs and distribution system of the United States. The relief sought is, in substance, that the respondents be restored to their former "rights and privileges" to receive the additional amounts of water (Fox R. 41; Parks R. 33; Ottmuller R. 34). This would require that water be stored in the reservoirs, that the headgates be adjusted, and that water be delivered to the respondents in the amounts to be fixed by the decree. Section 6 of the Reclamation Act, (43 U. S. C. 498, *infra*, p. 35) provides "That the title to and the management and operation of the reservoirs and the works necessary for their protection and operation shall remain in the Government until otherwise provided by Congress." It is plain that these bills contemplate a direct interference with the rights of property and management which are guaranteed by this section.

This conclusion is reinforced when the interest of the United States is viewed not only as one relating to its ownership of property but as one affecting a basic element of its reclamation policy. The orders attacked by the respondents recite that the water furnished them must be limited to the amount specified in their contracts in order to supply water to the Kittitas division (Fox R. 47; Parks R. 37; Ottmuller R. 43). The situation thus

appears to be one in which respondents seek to have enforced a right in opposition to the interest of the United States in (1) making an equitable distribution of a limited supply of water, and (2) in fulfilling the terms of its contracts with other landowners. While not a right superior to state law and policy, in the sense that Federal control of navigation is superior, the great importance of the proprietary and, broadly speaking, governmental interests of the United States requires, as in *Arizona* v. *California, supra,* that the litigation be dismissed because of the necessity that the United States be made a party defendant.

CONCLUSION

For the reasons which have been set forth in the foregoing, it is respectfully submitted that the judgments below should be reversed with directions that the bills of complaint should be dismissed.

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NOVEMBER, 1936.

APPENDIX

UNITED STATES CODE, TITLE 43

SEC. 372. *Water right as appurtenant to land and extent of right.*—The right to the use of water acquired under the provisions of the reclamation law shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right. (June 17, 1902, c. 1093, Sec. 8, 32 Stat. 390.)

SEC. 373. *General authority of Secretary of Interior.*—The Secretary of the Interior is hereby authorized to perform any and all acts and to make such rules and regulations as may be necessary and proper for the purpose of carrying the provisions of this chapter into full force and effect. (June 17, 1902, c. 1093, Sec. 10, 32 Stat. 390; Aug. 13, 1914, c. 247, Sec. 15, 38 Stat. 690.)

* * * * *

SEC. 383. *Vested rights and State laws unaffected by chapter.*—Nothing in this chapter shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this chapter, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or of the Federal

Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof. (June 17, 1902, c. 1093, Sec. 8, 32 Stat. 390.)

* * * * *

SEC. 498. *Transfer of management and operation of works to water users generally.*—When the payments required by this chapter are made for the major portion of the lands irrigated from the waters of any of the works herein provided for, then the management and operation of such irrigation works shall pass to the owners of the lands irrigated thereby, to be maintained at their expense under such form of organization and under such rules and regulations as may be acceptable to the Secretary of the Interior: *Provided,* That the title to and the management and operation of the reservoirs and the works necessary for their protection and operation shall remain in the Government until otherwise provided by Congress. (June 17, 1902, c. 1093, Sec. 6, 32 Stat. 389.)

REMINGTON'S REVISED STATUTES OF WASHINGTON

SEC. 7351. *State control—Appropriation of water rights—Existing rights preserved.*—The power of the state to regulate and control the waters within the state shall be exercised as hereinafter in this act provided. Subject to existing rights all waters within the state belong to the public, and any right thereto, or to the use thereof, shall be hereafter acquired only by appropriation for a beneficial use and in the manner provided and not otherwise; and, as between appropriations

the first in time shall be the first in right. Nothing contained in this act shall be construed to lessen, enlarge, or modify the existing rights of any riparian owner, or any existing right acquired by appropriation, or otherwise. They shall, however, be subject to condemnation as provided in section 7354 hereof, and the amount and priority thereof may be determined by the procedure set out in sections 7364 and 7377 inclusive hereof. [L. '17, p. 447, Sec. 1.]

SEC. 7408. *Eminent domain by United States.*—The United States is hereby granted the right to exercise the power of eminent domain to acquire the right to the use of any water, to acquire or extinguish any rights, and to acquire any lands or other property, for the construction, operation, repairs to, maintenance or control of any plant or system of works for the storage, conveyance, or use of water for irrigation purposes, and whether such water, rights, lands or other property so to be acquired belong to any private party, association, corporation or to the state of Washington, or any municipality thereof; and such power of eminent domain shall be exercised under and by the same procedure as now is or may be hereafter provided by the law of this state for the exercise of the right of eminent domain by ordinary railroad corporations, except that the United States may exercise such right in the proper court of the United States as well as the proper state court. [L. '05, p. 180, Sec. 1.]

SEC. 7411. *Appropriation—Title to beds and shores.*—Whenever said secretary of the interior or

other duly authorized officer of the United States shall cause to be let a contract for the construction of any irrigation works or any works for the storage of water for use in irrigation, or any portion or section thereof, for which the withdrawal has been effected as provided in section 7410, any authorized officer of the United States, either in the name of the United States or in such name as may be determined by the secretary of the interior, may appropriate, in behalf of the United States, so much of the unappropriated waters of the state as may be required for the project, or projects, for which water has been withdrawn or reserved under the preceding section of this act, including any and all divisions thereof, theretofore constructed, in whole or in part, by the United States or proposed to be thereafter constructed by the United States, such appropriation to be made, maintained and perfected in the same manner and to the same extent as though such appropriation had been made by a private person, corporation or association, except that the date of priority as to all rights under such appropriation in behalf of the United States shall relate back to the date of the first withdrawal or reservation of the waters so appropriated, and in case of filings on water previously withdrawn under said section 7410, no payment of fees will be required. Such appropriation by or on behalf of the United States shall inure to the United States, and its successors in interest, in the same manner and to the same extent as though said appropriation had been made by a private person, corporation or association. The title to the beds and shores of any navigable lake or stream

utilized by the construction of any reservoir or other irrigation works created or constructed as a part of such appropriation hereinbefore in this section provided for, shall vest in the United States to the extent necessary for the maintenance, operation and control of such reservoir or other irrigation works. [L. '29, p. 183, Sec. 1. Cf. L. '05, p. 182, Sec. 4.]

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In the
Supreme Court of the United States

OCTOBER TERM, 1936

No.....

HAROLD L. ICKES, SECRETARY OF THE INTERIOR,
PETITIONER

v.

MAZINE Z. FOX, ET AL.

No.....

HAROLD L. ICKES, SECRETARY OF THE INTERIOR,
PETITIONER

v.

PHILLIP LOUIS PARKS, ET AL.

No.....

HAROLD L. ICKES, SECRETARY OF THE INTERIOR,
PETITIONER

v.

JACOB F. OTTMULLER

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

Brief for the Respondents in Opposition

QUESTION PRESENTED

Whether the United States is an indispensable party defendant in actions brought "to vacate, set aside, and hold for naught" public notices and orders promulgated by the predecessor of, and now being enforced by petitioner, which are in violation of and over-ride the Constitution of the United States, Acts of Congress, constitution, statutes and decisions of the Supreme Court of the State of Washington.

STATUTES INVOLVED

The cases relate to a Federal reclamation project in the State of Washington, authorized by the reclamation law, and applicable statutes of the State of Washington. The pertinent provisions are set forth in the petition herein, and in the Appendix *infra.* pp. 31.

STATEMENT

On April 22, 1891, the Northern Pacific, Yakima and Kittitas Irrigation Company appropriated 1000 cubic feet of water per second of time of the water of the Yakima River. (U. S. vs. Union Gap Irr. Co. 209 Fed. 276). Later this appropriation was acquired by the Washington Irrigation Company, which company con-

structed the Sunnyside canal, and delivered water to the Parks land. The Ottmuller and Fox land was susceptible to irrigation by gravity flow from said canal, and said waters. In 1906 the United States, under the Reclamation Act, acquired the Sunnyside canal and water appropriations. Shortly thereafter the Secretary of the Interior determined that $10.00 per acre for the land which already had a water right (Parks land) and $52.00 per acre for the land which had no water right (Ottmuller and Fox land) would return to the reclamation fund the total cost of the project, including purchase price paid to the Washington Irrigation Company, construction of irrigation system and reservoirs, with requisite capacity to furnish all lands of respondents and all other lands within the Sunnyside division all the water necessary to beneficially and successfully irrigate the same.

Thereafter the United States entered into contract with the then owners of the Parks land, fixing the construction charges at $10.00 per acre for supplemental water right, permitting the use of sufficient water to beneficially and successfully irrigate the land. In 1909 the

Secretary of the Interior, pursuant to Title 43, USCA Sec. 419, issued public notice and order fixing construction charges on Ottmuller and Fox land at $52.00 per acre. The then owner of the Ottmuller and Fox lands made water right applications to the United States for permission to use sufficient water to beneficially and successfully irrigate their lands, and gave the United States a lien in the nature of a mortgage upon the land and water right, to secure the payment of the construction charges.

Successive Secretaries of the Interior and their representatives determined by factual investigation, that the Parks land required 6 acre feet, Ottmuller land 5.56 acre feet and Fox land 4.84 acre feet to beneficially and successfully irrigate the same, and said amount of water was, by successive Secretaries of the Interior, allocated to and permitted to be used on said lands. The United States constructed reservoirs of sufficient capacity to beneficially and successfully irrigate respondents' lands, and all lands in said division. Thereafter, and on August 13, 1914, the Reclamation Extension Act (43 USCA 469) took effect. This act provided that "No increase in construction charges

shall hereafter be made, after the same have been fixed by public notice," except by agreement. Pursuant to this act, Secretary of Interior Lane, on September 24, 1914, issued a public notice and order with reference to construction charges, which provided, "Where water right application has heretofore been made, shall be the amount fixed in the several public notices heretofore issued for the respective lands, and therein termed 'the building charge' and will not be increased except as provided in the Reclamation Extension Act."

Respondents Parks and Ottmuller fully paid all construction charges, and government lien was released. The Sunnyside Valley Irrigation District, including the respondents' lands, was formed in 1918, and it entered into a contract with the United States by the terms of which the district assumed and agreed to pay construction, operation and maintenance charges. Thereafter the Secretary released all liens on all lands.

In 1930, Elwood Mead, Commissioner of Reclamation, wished to expedite the construction of the Cle Elum reservoir, at a cost of $3,500,000.00, to store water to irrigate lands in the

Kittitas Reclamation District, the canal and distribution system in said district being in the process of construction at that time; and also for the purpose of furnishing water to irrigate lands in the Roza and Kennewick divisions of the Yakima project, the construction of which was contemplated at that time. Mead ascertained that the cost of said reservoir was $1,000,000.00 more than the amount which would be returned to the reclamation fund from said divisions, and without consulting the respondents or officials of the district, charged to the Sunnyside division the sum of $1,000,000.00. Thereafter officials of the United States tried to persuade respondents and other water users to authorize a contract binding respondents' lands and all lands in the district, to the last faithful acre, to pay this sum, which they refused to do. For the purpose of coercing and forcing the authorization of such a contract with the district, or collecting this sum under the guise of water rentals, the basic public notice and order upon which these suits are based, was issued, on October 17th, 1930. (Ex. "E" Parks R. p34; Ex. "F" Ottmuller R. p40 and Fox R. p40). On December 11th, 1930,

the Secretary of the Interior certified to the President (Ex. "D", R. p33 Parks; and Ex. "F" R. p39 Ottmuller and Fox) that of the cost of the Cle Elum reservoir, there would be returned to the Reclamation Fund "$1,000,000.00 by rentals from the Sunnyside division of the Yakima project, and the remainder by the Roza and Kennewick divisions of the project."

The Secretary of the Interior, Commissioner of Reclamation, and District Counsel, for the purpose of forcing and coercing the respondents and other water users to authorize said contract or to pay as water rentals said sum, notified the respondents that unless they signed a new contract in the form of a water rental application (Parks R. p27, Ottmuller and Fox R. p28) to pay for all water in excess of 3 acre feet for Ottmuller and Fox, and 3½ acre feet for Parks land, that they would be deprived of all water in excess of said amount.

The public notices sought to be vacated were not issued in good faith, or by the exercise of an honest judgment, but were arbitrarily and capriciously made and enforced for the express purpose of coercing and forcing the respondents and other water users to pay $1,000,-

000.00 increased construction charges above the amount fixed by public notice in 1909, and are in excess of the power and authority conferred upon the Secretary of the Interior by the Reclamation Act, and in positive violation of said Act; that the enforcement thereof will deprive respondents of about 40% of the water rights, the absolute title to which is vested in them, pursuant to the terms of the Reclamation Act, statutes of the State of Washingon, and contracts, without any hearing, and in positive violation of the due process clause (5th Amend.) of the Constitution of the United States. (Parks R. 22 to 37; Ottmuller R. 23 to 43; Fox R. 29 to 46).

REASONS FOR DENYING THE WRIT

I.

1. There are three reasons why the case of State of Arizona vs. State of California, relied upon by the Solicitor General, does not touch the question involved in these suits.

(a) The Arizona suit involved waters of a navigable stream over which the United States has control by virtue of the commerce clause (Art. 1, Sec. 8) of the Federal Constitution. while these suits involve non-navigable wa-

ters, over which Congress has waived its rights as sovereign and has conferred the jurisdiction of such waters upon the State of Washington (Act July 26, 1866; Act July 9, 1870; Cal. Ore. Power Co. vs. Beaver P. C. Co. 295 U. S. 142).

The pivotal point upon which the decision that the United States was a necessary party rested in the Arizona case, is found in the following statements by the Court:

> "The Colorado river is a navigable stream of the United States. The privilege of the states through which it flows and their inhabitants to appropriate and use the water is subject to the paramount power of the United States to control it for the purpose of improving navigation."
>
> "Every right which Arizona asserts is so subordinate to and dependent upon the rights and the exercise of an authority asserted by the United States that no final determination of the one can be made without a determination of the extent of the other."

The source of the waters upon which respondents' water rights are based is the Yakima river, a non-navigable stream over which the United States has waived its rights as a sov-

ereign, in and to the government and control of the waters, and has conferred the jurisdiction of such waters upon the State of Washington, which state, by its Constitution (Art. 21, Sec. 1) declared that the use of waters for irrigation was a public use, and its Legislature, in the first session in 1890, passed an Act (Laws 1890 p. 706) authorizing the appropriation of the unappropriated waters of the State for the purpose of irrigation, and by Chap. 88 Laws of 1905, passed an Act entitled "Relative to the use of State Waters for Irrigation Purposes," which authorized the United States to make water appropriations the same as a private individual. The statutes of Washington (Sec. 7382 to 7391 Rem. Rev. Stat.) expressly provide that the only right which can be obtained in the waters for irrigation is by beneficial use upon the land, and that the water rights thus obtained shall be appurtenant to the land reclaimed. The United States purchased the Sunnyside canal and water appropriations from the Washington Irrigation Company and constructed reservoirs, acting solely under and subject to the irrigation and appropriation laws of the State of Washington. (State of Nebraska

vs. State of Wyoming, 295 U. S. 40).

(b) In the Arizona case, neither Arizona as a sovereign state, or her citizens, had any present rights in the unappropriated water of the Colorado river, while in these suits the respondents' rights in and to the water of the Yakima river were initiated by the appropriation on April 22, 1891, by the Northern Pacific, Yakima and Kittitas Irrigation Company, of 1000 cubic feet of water per second of time, and were consummated by the actual application to beneficial use to the extent of 6 acre feet by Parks; 5.56 acre feet by Ottmuller; and 4.84 acre feet by Fox, to their respective lands, about twenty years ago.

In the Arizona case, the Court states:

> "A justiciable controversy is presented only if Arizona as a sovereign state, or her citizens, whom she represents, have present rights in the unappropriated water of the river, or if the privilege to appropriate water is capable of division, and when partitioned may be judicially protected from appropriation by others pending its exercise."

In that case the State of Arizona sought "in advance of any act of appropriation" to obtain

a judicial decree "exempting the available water of the river or some of it, from appropriation by other states, until the indefinite time when she or her inhabitants may see fit to appropriate it," while in these suits, the respondents seek to protect water rights which are a part and parcel of their land, and are appurtenant, under the Reclamation Act (43 USCA Sec. 372), statutes of the State of Washington (Sec. 7382 and 7391 Rem. Rev. Stat.) and the decisions of the Supreme Court of the State of Washington (In re. Creb Creek and Moses Lake, 134 Wash. 7) which water rights are real estate (Madison vs. McNeal, 171 Wash. 669, 675) and their land is without value except as supplied with water (Burbank Irrigation Dist vs. Douglas, 143 Wash. 396.)

(c) The purpose of the suit in the Arizona case was to partition the *waters* of the Colorado river between the State of Arizona and the State of California, subject to the paramount right of the United States in and to those waters; while the purpose of these suits does not involve the title to water, but to *water rights*, and is to vacate, set aside, and hold for naught certain public notices and orders, promulgated

by the predecessor of petitioner, and now being enforced by him, depriving respondents of about 40% of those water rights, on the ground that the public notices and orders are not within the authority conferred upon the Secretary of the Interior by Congress, are in positive violation of the Reclamation Act, the statutes of the State of Washington, and of the Federal Constitution, in that they deprive respondents of their property, and were promulgated and are being enforced, to coerce and force respondents and other water users to pay $1,000,000.00 toward the cost of the Cle Elum reservoir, which was constructed to furnish water to other divisions.

The trial Court, in its opinion, with reference to these orders, stated:

> "The orders made by the defendant were not authorized by Congress, and had they been so authorized would have deprived the plaintiffs of vested rights. The suits are not brought against the United States, but to set aside unauthorized acts of the defendant in cases in which he has no discretionary powers, and is acting arbitrarily." (Fox R. 29; Parks R. 22.)

The United States Court of Appeals for the District of Columbia, in its opinion, stated:

> "We are confronted again by the usual contention that this is a suit against the United States, and as such cannot be maintained. This is urged on the theory that the action is one to require the specific performance of a contract with the United States. This is not an action for specific performance. It is an action to restrain the Secretary of the Interior from enforcing the alleged illegal orders issued by that officer and his predecessor in office, in his capacity as the administrative agent of the government for the construction of irrigation works, and the disposition of the same, under the Reclamation Act. (38 Stat. 690 Sec. 15; 43 USCA Sec. 373). The suit, therefor, is one against an agent of the government, and not against the government itself, since no complaint is here made by the plaintiffs, of the existing contracts between them and the government. The validity of the contracts between the government and the plaintiffs is not here in issue. The question is whether or not the orders promulgated amount to a valid and enforceable extension of the terms

of the contract."

The Solicitor General does not call attention to any Act of Congress authorizing the promulgation and enforcement by the petitioner, of the orders and notices sought to be vacated. There are none. Authority to promulgate and enforce these orders is not conferred by Acts of Congress, but they are in positive violation of the express terms of the Reclamation Act in three particulars, to-wit:

(1st) The purpose and effect of these orders is to change the measure of a water right from beneficial use as fixed by the contracts, laws of the State of Washington and Reclamation Act, and which has been determined from factual investigation by predecessors in office of petitioner, to require 6 acre feet in the Parks case; 5.56 acre feet in the Ottmuller case; and 4.84 acre feet in the Fox case, arbitrarily to 3½ acre feet in the Parks case and 3 acre feet in the Ottmuller and Fox cases.

The basic public notice of October 17, 1930, sought to be vacated, expressly states with reference to Ottmuller and Fox land, "During the year 1931 and subsequent years, and until further notice, water deliveries in that district

will be limited to 3 acre feet per irrigable acre per year." The supplemental water right contract in the Parks case, and the water right applications in the Ottmuller and Fox cases permit the use of a sufficient amount of water to beneficially and successfully irrigate their land. This is the legal measure, fixed by laws of the State of Washington (Sec. 7382 and 7391 Rem. Rev. Stat.) and by the Reclamation Act (43 USCA Sec. 372) which Act expressly provides that "beneficial use shall be the basis, the measure and the limit of the right."

(2nd) The purpose and effect of these notices and orders was to increase the construction charge on respondents' lands about 35% above the amount fixed by Secretary Garfield by public notice in 1909, in positive violation of the Reclamation Extension Act (43 USCA 469) which expressly provides that no increase in construction charges shall be made except by agreement. Respondents were notified that they would be deprived of all water in excess of 3 acre feet on Ottmuller and Fox land, and 3½ acre feet on Parks land, unless they signed a new water-rental application agreeing to pay such charges. (Ottmuller R. 28 and Parks

R. 27). The public notice of October 17, 1930, provides "All money collected for the rent of such extra water will be applied toward the payment on the unsecured portion of the construction costs of the reservoir system of the Yakima project." The certificate by the Secretary to the President (Parks R. 33; Fox R 42) stated that the cost of the Cle Elum reservoir was $3,500,000.00 and that of this amount, repayment of "$1,000,000.00 would be made by rentals from the Sunnyside division of the Yakima project, and the remainder by the Roza and Kennewick divisions of the project."

(3rd) The basic public notice of October 17, 1930, states the reason for the promulgation of the orders was to furnish water to the Kittitas division, which was an attempt on the part of petitioner to take away first rights of respondents, and give those rights to the Kittitas division, which as stated in the notice, was "beginning the use of water to which it is entitled under the contract between the Kittitas Reclamation District and the United States."

The Reclamation Act (43 USCA 523) authorizes the Secretary of the Interior to make contract with new divisions only "to an extent not

exceeding such excess capacity" of the storage or carrying capacity, and requires that "the Secretary of Interior preserving a first right to the lands and entrymen under the project." Instead of preserving a first right to the lands of respondents as required by the statute, the notice and order expressly stated that the first rights of respondents would not be preserved. The act authorizes the Secretary of the Interior to contract with the Kittitas Division only to an extent not exceeding the excess capacity of storage required to furnish respondents' land the amount of water necessary to beneficially and successfully irrigate the same.

2. The opinion of the lower Court is in harmony with American Falls Rec. Dist. vs. Crandall (82 Fed. 2nd 973) for three reasons:

(a) The orders and notices sought to be vacated by these suits were promulgated and being enforced by the petitioner as a part of his administrative duties. In the Crandall case the court said:

> "If the suit be considered one for the enforcement of purely administrative duties, such as the assessment of charges of construction, the United States would not be a necessary part."

These suits are to restrain the enforcement of orders and notices promulgated as administrative duties for the assessment of $1,000,000.00 construction charges, to pay a portion of the cost of the Cle Elum reservoir, which are not within the statutory authority conferred upon the petitioner, but are in positive violation of congressional legislation. If the United States is not a necessary party in connection with administrative duties which are performed in accordance with state laws (43 USCA 383) then certainly, when the Secretary steps entirely outside of authority conferred upon him, and acts in positive violation of the Acts of Congress (43 USCA 372 and 469) the United States is not a necessary party.

(b) The purpose of the Crandall suit was to require the physical delivery of the natural flow water, that is, the corpus of the water, while the relief asked in these suits is not the physical delivery of water, but simply to vacate the notices and orders which affect not the corpus of the water, but water rights, the title to which water rights are in the respondents.

(c) In the Crandall case, the suit was by the

district, which could not acquire a water right, for it did not own the land upon which water was beneficially applied, neither did it make the application of the water. A property right in the use of water can be obtained only by beneficial use of water upon the land, and the title thereto vests in the owner of the land. All contract rights between the United States and the respondents were fully executed. The United States constructed the reservoirs and irrigation system. The respondents gave a mortgage to the United States upon their lands and water rights, to secure the payment of the construction charges. These have been fully paid. All rights to control or pass upon respondents' rights to the use of those waters has passed from the Secretary of the Interior. (Moore vs. Robbins, 96 U. S. 530; 43 USCA 491).

3. The cases of Wells vs. Roper; Boeing Air Transport vs. Farley; Transcontinental and Western Air, Inc. vs. Farley, cited by Solicitor General, do not touch the issues involved in these suits, because in those cases, Congress had entrusted the matters at issue to the judgment and discretion of the Postmaster General, and he was acting within the statutory

authority and jurisdiction conferred upon him, in handling of the mails, which is a function of sovereignty. The United States has a property right in the mails, and an interest in their protection and transportation. In these cases the acts challenged are not within, but beyond, the scope of authority conferred upon the petitioner by Congress, and are in positive violation of the terms of the Reclamation Act. In the Shoshone Irrigation District vs. Ickes case, the plaintiff sought to control the acts of the Secretary of the Interior in matters left to his judgment and discretion by the Reclamation Act.

The Solicitor General states that a water right can be acquired only by appropriation from flowing waters of a natural stream. This statement is contrary to the statute (Sec. 7378 to 7391 Rem. Rev. Stat.) which expressly states that a water right can be obtained from water stored in a reservoir or from natural flow water, by beneficial use upon the land, and that the title to the water right so obtained vests in the owner of the land, the same in one case as in the other, and such water rights so acquired by beneficial use "shall be and remain appur-

tenant to the land or place upon which the same is used." The lower Court correctly stated the true rule under the state statute "before there can be an appropriation the water must be applied to a beneficial use." (Madison vs. McNeal, 171 Wash. 669).

The statement made by the Solicitor General to the effect "that water once diverted from flowing streams becomes, in the ditches and reservoirs of the appropriators, personalty subject to contractual disposition" is contrary to the later decisions of the Supreme Court (Madison vs. McNeal, 171 Wash. 669) and also contrary to the well settled law of the arid land states, which expressly holds that diversion and storage are not sufficient to constitute an appropriation, that no property right can be acquired in the uses of water until it has been applied to a beneficial use upon the land, and the owner of the reservoir or carrying ditch acquires no title or right to use the water and has no property rights in it subject to disposal, but such property rights of disposal is in him who applies the water to beneficial use upon the land for the purpose of irrigation. (Highland Ditch Company vs. Union Reservoirs

Company, 127 Pacific Rep. 1025; Payne Irrigation District vs. Board of Commissioners, 236 F. 790.) In the Madison case the right to the use of the flow of water stored in a reservoir was involved, and the court expressly held that the right to the use of water in its natural state, or through pipes from a reservoir, was an incorporeal hereditament, and that it was real estate. This being true, there is no necessity of assignment of right by the United States to respondents, for under these decisions and the statutes of the State of Washington, the only right which can be obtained either from the natural flow or stored water, is the incorporeal right to beneficial use, and the title to this right vests in the respondents, who actually applied the water to beneficial use upon their lands, more than twenty years ago, and *no* title vests in the United States which constructed the reservoir and irrigation system.

The statement referred to in Methow Cattle Company vs. Williams, 64 Wash. 457, was beyond the point involved and mere dicta, and under the rule announced by this court in Humphries Executors vs. United States, 295 U. S. 602, does not come within the doctrine of

stare decisis, and is contrary to later decisions (Madison vs. McNeal) of the same court. In Ament vs. Bickford, 139 Wash. 494, the court held that where a water right was being trespassed upon, the owner should be protected by an injunction.

II.

The decisions below are in harmony with a long line of decisions in this court where an executive officer has taken a step beyond the authority conferred upon him. The Tucker Act, 28 USCA 41 (20) 251 (1) affords no relief to respondents, for the reason that the orders and notices were pormulgated without any statutory authority, and as stated in Langford vs. United States, 101 U. S. 341-345, "For such acts, however high the position of the officer or agent of the Government who did or commanded them, Congress did not intend to subject the Government to the results of a suit in that court." In this case the court denied recovery for the use of buildings owned by a private citizen, which were seized by an Indian Agent. In the case of Schillinger vs. United States, 155 U. S. 162, this court held that the Court of Appeals had no jurisdiction of an ac-

tion against the United States for the wrongful use of a patent for the reason it was founded upon a tort.

The questions raised by these cases have been fully and carefully considered by this court in numerous decisions, and the law is well established by an unbroken line of authorities. No new question is involved. The two questions raised are:

Has the Secretary of the Interior the right to issue an edict in the form of a public notice and order, depriving the respondents of about 40% of their water rights, without any notice or process, for the purpose of forcing them and other water users to pay increased construction charges to the extent of $1,000,000.00, over-riding the Constitution of the United States, Acts of Congress, statutes and decisions of the State of Washington?

Do such public notices and orders so promulgated have such sancity that they cannot be reviewed in the Federal courts under Art. 3, Sec. 2 of the Federal Constitution, and vacated in the interest of justice?

The purpose and effect of the public notices

and orders are:

1. To change the measure of the water right from beneficial use as fixed by Congress (43 USCA 372) arbitrarily to 3 and 3½ acre feet. If permitted to stand, these orders override this act of Congress.

2. To increase the construction charges from the amount fixed by public notice at $52.00 per acre for Fox and Ottmuller land and by contract at $10.00 per acre for Parks land, without consent of respondents, in positive violation of the express terms of the Reclamation Extension Act (43 USCA 469) and in positive violation of the public notices promulgated by Secretary of the Interior Lane on September 24, 1914, to the effect that there would be no increase. If permitted to stand, these orders over-ride this act of Congress, and also the determination made by a former Secretary of the Interior, thereby over-riding decisions of the Federal court. (Wilbur vs. Burley Irrigation Dist. 58 Fed. 2nd 871; Noble vs. Union River Logging Co. 147 U. S. 165.)

3. To deprive respondents of about 40% of their water rights which are incorporeal hereditaments, whether the water is from natural

flow of the Yakima river or stored in reservoirs; and are real estate (Madison vs. McNeal, 171 Wash. 669, 675) the title to which became vested in respondents and are part and parcel of their land and appurtenant thereto by beneficial use thereon, to the extent of 6 acre feet on Parks land and 5.56 acre feet on Ottmuller land and 4.84 acre feet on Fox land, under decision of the Supreme Court of Washington (134 Wash. 7, 12) and statutes of Washington (Sec. 7391 Rem. Rev. Stat.) under which the United States was acting in the purchase of the Sunnyside Canal and irrigation system and construction of reservoirs (State of Nebraska vs. State of Wyoming, 295 U. S. 40) and also by terms of the Reclamation Act (43 USCA 372) in violation of the 5th Amendment of the Constitution of the United States. If permitted to stand, these orders over-ride the Constitution and become the "Supreme Law of the Land."

This Court has reviewed many such orders and without exception has held them void. The rule is succinctly stated in State of Colorado vs. Toll (268 U. S. 228, 69 Law Ed. 927), as follows:

> "If an executive officer, federal or state, is committing or is about to commit acts unauthorized by or in violation of law, to the irreparable injury of the property rights of another, such act or threatened action is good ground for injunctive relief against such officer."

And the reason for the rule is clearly stated in American School of Magnetic Healing vs. McAnnulty, 187 U. S. 94, 47 L. Ed. 90, page 96, as follows:

> "Otherwise, the individual is left to the absolutely uncontrolled and arbitrary action of a public and administrative officer, whose action is unauthorized by any law, and is in violation of the rights of the individual. Where the action of such an officer is thus unauthorized, he thereby violates the property rights of the person whose letters are withheld."

Some of the leading cases where this rule is firmly established are as follows: Noble vs. Union River Logging Co., 147 Wash. 164; Garfield vs. Goldsby, 211 U. S. 249; Ballinger vs. United States, 216 U. S. 240; Lane vs. Watts, 230 U. S. 525; Lane vs. Hoglund, 244 U. S. 174; Payne vs. Central Pacific Railroad, 255 U. S.

228; Wilbur vs. United States ex rel Krushnic, 280 U. S. 306-319; Ickes vs. Colorado Development Co., 295 U. S. 639.

If certiorari is denied and these cases remanded for trial, no witnesses are necessary, for there is no issue to be tried. These cases are based upon public notics and orders issued by the Secretary of the Interior and a certificate made by him to the President, copies of which are attached to the amended bills, all of which are public records. The Court of Appeals has answered all and the only questions involved, namely: Can the Secretary of the Interior change the measure of a water right from beneficial use which requires 6 acre feet on the Parks land, 5.56 acre feet on the Ottmuller land and 4.84 acre feet on the Fox land, arbitrarily to 3½ acre feet on the Parks land and 3 acre feet on the Ottmuller and Fox land, where the contracts, statutes of the State of Washington, and Reclamaion Act provide that beneficial use is the measure? Can the Secretary of the Interior increase the construction charges upon respondents' lands after the same have been fixed by public notice, when the Reclamation Extension Act (43 U. S. 469)

expressly denies him that right? Both questions were answered by the trial court and the appellate court in the negative. There is no other issue involved in these suits which it is necessary to try. These facts can be established by certified copies of the government records at Washington, D. C., and cannot be denied.

I submit that the decisions below are correct. That there is no conflict of authority, and that the same are sustained by many decisions of his court. The petitions should be denied.

Respectfully submitted,

STEPHEN E. CHAFFEE
Attorney for Respondents.

September, 1936.

APPENDIX

UNITED STATES CODE ANNOTATED, TITLE 43

SEC. 419. *Contracts for Construction—Public Notice of Irrigable Lands—Limit of Area—Charges per Acre* * * *—Upon the determination that any irrigation project is practicable, the Secretary of the Interior may cause to be let contracts for the consruction of the same, in such portion or sections as it may be practicable to construct and complete as parts of the whole project, providing the necessary funds for such portion or sections are available in the reclamation fund, and thereupon he shall give public notice of the lands irrigable under such project, and limit of area per entry, which limit shall represent the acreage which in the opinion of the Secretary, may be reasonably required for the support of a family upon the lands in question; also of the charges which shall be made per acre upon the said entries, and upon lands in private ownership which may be irrigated by the waters of the said irrigation project. * * * (June 17, 1902, 32 Stat. 389).

SEC. 469. *Restrictions on Increasing Con-*

struction Charges * * *—No increase in the construction charges shall, after August 13, 1914, be made, after the same have been fixed by public notice, except by agreement between the Secretary of the Interior and a majority of the water right applicants and entrymen to be affected by such increase. * * *

SEC. 491. *Reclamation Fund to Be Used for Operation and Maintenance—Management of Works to Pass to Landowners—Title.*—The Secretary of the Interior is authorized and directed to use the reclamation fund for the operation and maintenance of all reservoirs and irrigation works constructed under the provisions of this chapter; provided, that when the payments required by this chapter are made for the major portion of the lands irrigated from the waters of any of the works herein provided for, then the management and operation of such irrigation works shall pass to the owners of the lands irrigated thereby, to be maintained at their expense under such form of organization and under such rules and regulations as may be acceptable to the Secretary of the Interior. * * * (June 17, 1902, 32 Stat. 389).

SEC. 7390. *Reservoir Permits—Applications for Secondary Permits*—All applications for reservoir permits shall be subject to the provisions of Sections 7378 to 7385, both inclusive. But the party or parties proposing to apply to a beneficial use the water stored in any such reservoir shall also file an application for a permit, to be known as a secondary permit, which shall be in compliance with the provisions of Sections 7378 to 7385, both inclusive. Such secondary application shall refer to such reservoir as its source of water supply and shall show documentary evidence that an agreement has been entered into with the owners of the reservoir for a permanent and sufficient interst in said reservoir to impound enough water for the purposes set forth in said application. When the beneficial use has been completed and perfected under the secondary permit, the state hydraulic engineer shall take proof of the water users under such permit and the final certificate of appropriation shall refer to both the ditch and works described in the secondary permit and the reservoir described in the primary permit.

SEC. 7391. *Water Appurtenant to Land* * * * *. The right to the use of water which has been applied to a beneficial use in the state shall be and remain appurtenant to the land or place upon which the same is used. * * *

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Note:

Reclamation Act as used in this brief means the Act of June 17th, 1902, and reclamation law, all Federal statutes pertaining to reclamation. Other terms as used in Sec. 371, page 113, Appendix. Italics in quotations are ours.

In the Supreme Court of the United States

OCTOBER TERM, 1936

No. 266

HAROLD L. ICKES, SECRETARY OF THE INTERIOR, PETITIONER

v.

MAZINE Z. FOX, ET AL

No. 267

HAROLD L. ICKES, SECRETARY OF THE INTERIOR, PETITIONER

v.

PHILLIP LOUIS PARKS, ET AL

No. 268

HAROLD L. ICKES, SECRETARY OF THE INTERIOR, PETITIONER

v.

JACOB F. OTTMULLER

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

Brief for Respondents

QUESTIONS PRESENTED

Is the United States a necessary party defendant in these suits brought against the Se-

cretary of the Interior to vacate, set aside and hold for naught certain public notices and orders promulgated by his predecessor and being enforced by him, which are not within the authority conferred upon the Secretary by, but are in positive violation of the Reclamation Act in four particulars (infra pages 60, 79, 87 and 98), override the Constitution of the United States (5th Amendment), also statutes and judicial decisions of the State of Washington?

Do these public notices and orders which were arbitrarily and capriciously made without the exercise of an honest judgment have such sanctity that they cannot be reviewed in the Federal courts under the Federal Constitution (Art. 3, Sec. 2), and vacated in the furtherance of justice without making the United States a party defendant (which it is impossible to do)?

STATUTES INVOLVED

The Reclamation Act and statutes supplementary thereto and statutes of the State of Washingon, pertinent provisions of which are set forth in the Appendix (infra pages 113 to

124) and also in Appendix to Petitioner's brief and in the argument herein.

STATEMENT OF THE CASE

The purpose of these suits is to secure a mandatory injunction commanding the petitioner, as Secretary of the Interior, to vacate, set aside and hold for naught certain public notices and orders dated October 17, 1930, February 14, 1932 and May 5, 1932 (Fox 46, 47; Ottmuller 43, 44; Parks 36, 37), promulgated by his predecessor in office and now being enforced by petitioner on the ground that the same are not within the authority conferred upon the Secretary of Interior by Congress, are in positive violation of four express provisions of the Reclamation law, three of which have been the elementary and fundamental doctrine of the right to the use of water, or water rights by appropriation since the initiation of that doctrine in the arid land states, and which deprive respondents of their "right to the use of water acquired" under the Reclamation Act, or water rights, the absolute title in fee simple being vested in them and which are appurtenant to their real property, in violation of the due process clause (5th Amendment), of the Fed-

eral Constitution, overriding the Reclamation law and contract with the Sunnyside Water Users Association, May 7, 1906, water right applications, supplemental water right contract, statutes and judicial decisions of the State of Washington, which public notices and orders were not promulgated in good faith or by the exercise of an honest judgment, but were arbitrarily and capriciously made and enforced to force and coerce the respondents and other owners of the right to the use of water from the natural flow and impounded in storage reservoirs of the waters of the Yakima River, a non-navigable stream in the State of Washington, and in the Sunnyside Valley Irrigation District, to pay $1,000,000.00 of the cost of the construction of the Cle Elum Reservoir, for the purpose of furnishing water rights to lands in other divisions, as a condition precedent to the enjoyment of the right of respondent Fox to the use of water to the extent of 4.84 acre feet, Ottmuller to the extent of 5.56 acre feet and Parks to the extent of 6 acre feet of water per acre per annum, which was determined by the Secretary of the Interior to be the measure of their water rights, prior to 1914, pur-

suant to contract of May 7, 1906, and which they have beneficially used upon their respective lands since that time.

THE FACTS

Pursuant to the reclamation law and applicable statutes of the State of Washington, the Secretary of the Interior approved a project known as the Sunnyside division of the Yakima project and the United States acquired from the Washington Irrigation Company, the Sunnyside Canal and water appropriations. As a condition precedent to the construction of reservoirs and other works, the land owners in said project were required to incorporate the Sunnyside Water Users Association and for this associtaion to enter into contract with the United States, relative to the repayment of the construction costs. The corporation was formed and on May 7, 1906, it entered into contract with the United States, which among other things, provided that if the irrigation works were constructed the association would guarantee the payment of the cost thereof to be apportioned by the Secretary of Interior (Fox and Ottmuller 12, Parks 11).

James Rudolph Garfield, the then Secretary of Interior, estimated the total costs of the acquisition of the Sunnyside Canal, water appropriations and irrigation system and the construction of reservoirs adequate and sufficient to beneficially and successfully irrigate respondents and all other lands in the division, with a view of returning to the reclamation fund the estimated cost of the project, and thereafter he determined that the construction charges for each irrigable acre of the Fox and Ottmuller land would be $52.00, and on March 2nd, 1909 issued a public notice and order fixing the charges accordingly (Fox 42, Ottmuller 34). The then owners of these lands made water right applications, in which they applied "for a water right" for irrigation of and *to be appurtenant* to respondents' lands "at the estimated costs of construction as fixed by the Secretary of the Interior, namely, the sum of $52.00 per acre; * * * that the construction charges, and each and all of said annual charges for operation and maintenance with accrued penalties *shall be and the same are hereby made a lien upon the tract of land* above described and *all water rights now or*

hereafter appurtenant or belonging thereto and with *all improvements now existing or hereafter made thereon;*" (Fox 17) "such lien or liens shall have *full force and effect of a mortgage or deed of trust* and vest in the United States all the rights and powers which might be exercised and all benefits which might be claimed by the mortgagee in a real estate mortgage given to secure the payment of a loan or debt, including the right of foreclosure by or on behalf of the United States (Ottmuller 17). The supplemental water right contract in the Parks case, of August 6th, 1907, which served as a water right application, fixed the construction charge at $10.00 per acre (Parks 15).

The United States completed the construction of the reservoir of sufficient capacity to beneficially and successfully irrigate all lands within said unit prior to August 13th, 1914, and fully complied in every particular with all contracts entered into in connection with the water rights in question, and no dispute has ever arisen between the United States and respondents relative thereto.

Prior to this time, successive Secretaries of the Interior, from information obtained by a

factual investigation and personal examination of the land and water requirements thereof made by their subordinates and representatives charged with the physical distribution of the water, pursuant to Sec. 3 of the contract between the Secretary and Sunnyside Water Users Association, of May 7th, 1906, which required the Secretary to make a determination "based upon and measured and limited by the beneficial use of water," determined that 4.84 acre feet for Fox land, 5.56 acre feet for Ottmuller land and 6 acre feet for the Parks land was necessary to beneficially and successfully irrigate the same, and based upon the information so obtained and pursuant to said contract determined said amounts to be the measure of the water rights for respondents' lands, and for more than twenty years pursuant to settled custom and practice on the project and on all other Federal projects, these lands enjoyed water rights to this extent (Fox 34, 35; Ottmuller 26, 27; Parks 26, 27).

The Reclamation Extension Act, approved August 13th, 1914 (43 USCA 469), provides *"that no increase of the construction charges* shall, after August 13th, 1914, be made, after

the same have been fixed by public notice, except by agreement." On September 24th, 1914, Franklin K. Lane, the then Secretary of the Interior, issued a public notice and order, which among other things, provides that the construction charge as fixed by public notice (Notice of Secretary Garfield, May 2, 1909, Fox 43), "shall be the amount fixed * * * and will not be increased" (Fox 35, 43; Ottmuller 28, 40). Respondents Parks and Ottmuller fully paid all construction charges and the lien therefor was released (Parks 27, Ottmuller 28). The Sunnyside Valley Irrigation District (Co-extensive with Sunnyside Division of Yakima project, Parks 12), including respondents' land, was incorporated in 1918 and it entered into contract with the United States by the terms of which the district assumed and agreed to pay all construction operation and maintenance charges, to the extent of $2,000,000.00 (Fox and Ottmuller 6, Parks 5). Thereafter the Secretary, pursuant to Act of May 15th, 1922 (43 USCA 512), released all liens on all lands in said district.

In 1930, Elwood Mead, Commissioner of Reclamation of the United States, recommended

the construction of the Cle Elum Reservoir at a cost of $3,500,000.00, for the purpose of storing water for the irrigation of lands in the Kittitas Reclamation District, then under construction, and Roza and Kennewick Divisions, the construction of which was contemplated. He estimated the cost of this reservoir to be $1,000,000.00 more than the amount which would be returned to the reclamation fund from these new divisions. After December 5th, 1924, before a new division of a project could be approved for construction, it was necessary for the Secretary to estimate the cost of construction of a new division and that it would probably return the cost thereof to the United States (43 USCA 412), and no construction could be commenced until recommended by the Secretary of Interior and approved by direct order of the President (43 USCA 413). It was necessary therefore, to make provision for said sum from some other source. Without consulting the respondents or other water users in the Sunnyside division and district, Mead charged the sum of $1,000,000.00 to said division and district, furnished the Secretary information that provision had been made for

the payment by said division or district of said sum (Fox 35, Ottmuller 26, Parks 27).

Officials of the Bureau of Reclamation attempted to persuade respondents and other water users to authorize the officials of the district to execute a contract with the United States to pay $1,000,000.00 construction charges, a portion of the cost of the Cle Elum Reservoir to be constructed for said new divisions and obligate the last faithful acre in said district to pay said sum. This amount was equivalent to an increase of about 35% of the original cost of the construction charges for respondents' lands, as fixed by Secretary Garfield in 1909. Respondents and other water users refused to authorize this contract (Fox 26, Ottmuller 28, Parks 27).

Thereafter, Mead, Commissioner of Reclamation, Stoutemyer, District Counsel, and the then Secretary of Interior, Wilbur, in order to force and coerce respondents and other water users to either authorize the district to enter into contract to pay the sum of $1,000,000.00, or to collect the same through water rental applications, caused the Assistant Secretary of Interior on October 17th, 1930, to is-

sue the basic order sought to be vacated, which among other things, changed the measure of respondent Fox water right from 4.84 acre feet, Ottmuller from 5.56 acre feet and Parks from 6 acre feet, the amount ascertained and determined by the Secretary of Interior pursuant to Sec. 3 of contract of May 7th, 1906 (Ottmuller 13), prior to August 13th, 1914, under "beneficial use" rule, arbitrarily to 3 acre feet on the Fox and Ottmuller land and 3½ acre feet on the Parks land; increased building or construction charges about 35% above the amount fixed by Secretary of Interior Garfield in 1909; struck down 1.84 acre feet of the water right from the Fox land, 2.56 acre feet of the water right from the Ottmuller land and 2.50 acre feet of the water right from the Parks land, which water rights had been beneficially used upon and were appurtenant to respondents' lands for more than twenty years, and after respondents Ottmuller and Parks had fully paid all construction charges and the lien therefor had been released, and after respondent Fox had paid all operation, maintenance and construction charges and the Sunnyside Valley Irrigtaion District had been incorporat-

ed and entered into contract assuming the payment of all charges and the Secretary had released all liens on lands in the project; and took away water rights from respondents' lands for the Kittitas Reclamation District, a new division, in violation of the property rule or maxim "first in time, first in right" which has been the law in Washington, since 1873, as declared by statute and judicial decisions of that state, which the Secretary is commanded to observe by "preserving a first right to lands" of the respondents (Fox 37, 46; Ottmuller 29, 43; Parks 28, 36).

Pursuant to this public notice and order and public notices and orders of February 19th, 1932, and May 5th, 1932 (Fox 48, Ottmuller 44, Parks 38), Fox and Ottmuller were notified that they would be deprived of all water in excess of 3 acre feet and Parks in excess of 3½ acre feet, unless they executed a water rental application agreeing to pay for all water in excess of said amounts in the following form:

"WATER RENTAL APPLICATION

"The undersigned applicant requests excess water under public notice issued by the Secretary, February 19th, 1932, and

agrees to pay applicable charges, with 6% interest from December 1st, 1932, until paid. He further agrees that water may be withheld from his land after 1932 until such charges are paid. It is understood that advance payment for excess water will be required in 1933 if the 1932 rental charge remains unpaid at that time.

Witness:..... .....

Water User."

It was agreed between the Secretary, Commissioner of Reclamation and District Counsel and the representatives of the new divisions for which the Cle Elum Reservoir was to be constructed, that an attempt would be made by means of the public notices and orders sought to be vacated, and the water rental applications, to collect from the water users in said unit and district the sum of $1,000,000.00, and if they were unsuccessful in making collection by these methods, then and in that event the new divisions for which the Cle Elum Reservoir was to be constructed, would pay the sum (Fox 37, Ottmuller 30, Parks 29).

On December 11th, 1930, the Secretary recommended for approval to the President, the

construction of the Cle Elum Reservoir at a cost of $3,500,000.00, and stated that of this amount $1,000,000.00 would be paid by rentals from the Sunnyside Division of the Yakima Project (Fox 45, Ottmuller 41, Parks 35).

The actual cost of the construction of the Cle Elum reservoir was $1,003,000.00 less than the estimated cost, made by the Secretary at the time he recommended to the President the construction of the reservoir. The new divisions have also entered into contracts to purchase additional water rights from said storage at a cost of several million dollars. On account of these facts, there is no necessity for the enforcement of the public notices and orders sought to be vacated (Fox 39, Ottmuller 32, Parks 31).

Three acre feet for the Fox and Ottmuller land and 3½ acre feet for the Parks land is wholly insufficient to beneficially and successfully irrigate the same and if respondents attempt to spread this amount of water over the whole tract, they will not have sufficient water to grow any profitable crop and the land will be completely destroyed for farming purposes,

which cannot be compensated for in an action at law (Fox 38, Ottmuller 31, Parks 30).

SUMMARY OF ARGUMENT

The purpose and essence of the reclamation law which was in force at the time of the approval of the Sunnyside division of the Yakima project by the Secretary and the construction of the storage reservoirs and irrigation system and payment by respondents of the cost thereof, was, that the United States would, after approval of the project by the Secretary, from moneys in the "reclamation fund" (43 USCA 391), provide the necessary funds to pay the entire cost of the project, including engineering expenses; that the Secretary would determine the total cost of the acquisition and construction, with a view of returning to the reclamation fund the entire cost of the project (43USCA 461); that the Secretary would then determine the cost of the project and what was known as the "building charge," and issue a public notice and order fixing the amount of such charges to be paid for each acre of irrigable land in the project (43 USCA 419); that the United States had a prior lien upon the land, together with all water rights appurten-

ant thereto and all improvements thereon for the amount so fixed, by virtue of which the Secretary was authorized, in case of the non-payment of the construction charges by the water user, to sell the land and out of the proceeds of the sale pay into the reclamation fund all moneys due, and the balance, if any, would be the property of the owner of the land (43 USCA 542); that upon full payment being made of the building or construction charges to the United States, a certificate would be issued certifying full payment of the same, and that the lien upon the land and water right was satisfied and no longer of any force (43 USCA 543); that when the payments or construction charges for a major portion of the lands irrigated from the waters of any works, in any division had been made, that the management and operation of such irrigation works, with the exception of the title to and management and operation of the reservoirs necessary for their protection and operation, *shall pass to the owners of the land irrigated and be maintained at their expense* (43 USCA 498; *that the right to the use of water to be acquired* by the water users was to be of the

character generally approved by rules, customs, statutes and judicial decisions of the arid land states, since the initiation of irrigation by appropriation and such as would absolutely insure the user in his right "and to provide that the absolute title to "the right to use of water acquired" by the water user would vest in him and that he would, by the beneficial use of the water upon his land, lay the foundation for the right which was to be inseparable from the lands irrigated, the act provided: "The *right to the use of water acquired* under the provisions of the reclamation law *shall be appurtenant to the land irrigated,* and *beneficial use shall be the basis, the measure* and *the limit* of *the right.*" (43 USCA 372).

During the time of the construction of the reservoirs in question, Congress authorized the Secretary of the Interior to enter into contracts for surplus stored water not needed for the water rights to irrigate lands under irrigation, which expressly required the Secretary to preserve a *first right* to lands under irrigation (43 USCA 523), and after completion of reservoirs and irrigation system, restricted the increase of construction charges after the same had

been fixed by public notice, except by agreement (Reclamation Extension Act, August 13, 1914, 43 USCA 469). The Sunnyside Valley Irrigation District was incorporated in 1918 and pursuant to the reclamation law (Act of May 15, 1922, 43 USCA 511), entered into contract with the United States, by the terms of which said district agreed to pay all construction, operation and maintenance charges, and the Secretary released all liens for construction, operation and maintenance charges in favor of the United States, contained in the water right applications and supplemental water right contract (43 USCA 512).

The Yakima River, the source of the natural flow and impounded waters, the right to the use of which, or water rights, are involved in these suits, is a non-navigable stream. The United States waived its rights to the government and control of the waters of this stream (43 USCA 661) and by Section 8 of the Reclamation Act (43 USCA 383) recognized that the right to control, appropriate, use and distribute the waters was vested in the state, and the United States, in the construction of this project, acted solely under and subject to the ap-

propriation and irrigation laws of the State of Washington (State of Nebraska vs. State of Wyoming, 295 U. S. 40, 42).

The United States, in the acquisition of the Sunnyside Canal, water appropriations (1,000 cubic feet of water per second of time appropriated by Northern Pacific Yakima and Kittitas Water Company on April 22, 1891); construction of reservoirs and irrigation system, was acting for the water users in the project (designated as shareholders in contract between the Secretary and Sunnyside Water Users' Association, of May 7, 1906), the predecessors in title of respondents; that under the express terms of the Reclamation Act, the only right which is provided for is *"the right to the use of the water acquired"*; that a condition precedent for the enjoyment of this right was the "beneficial use" by the predecessors in title of the respondents upon the lands now owned by respondents, for the act states: *"beneficial use shall be the basis * * * and the limit of the right,"* which of course, means that the actual use of the water upon the land for agricultural purposes is the foundation of, and that no right exists without such use of the

water and when it was so used upon respondents' lands, it became the most valuable part thereof, and in the words of the act "appurtenant to" their lands, and that without the actual application of the water to these lands, the predecessors of the respondents acquired no "right to the use of the water" but upon the *beneficial use* by them, they *acquired* title to *"the right to the use of water,"* or in the language of the statutes and judicial decisions, completed the appropriation of the water and acquired a water right to the extent that it was necessary for the purpose of irrigating their lands for agricultural purposes to the full extent of the soil, for the Act gives the yardstick to be used in measuring the water right to be acquired, and expressly provides that *"beneficial use shall be * * * the measure * * * of the right,"* and also refers to *"the right * * * acquired,"* which of course, means that all and the only right which was contemplated by the act vests in the respondents, which right was acquired, not by purhcase from the United States, but under and pursuant to the statutes and judicial decisions of the State of Washington.

All that the United States did was to advance the necessary funds to pay the construction costs of the arificial means (reservoirs and irrigating system), so that respondents might enjoy this right, and as security for all funds so advanced, the predecessors in title of the respondents executed liens in the nature of mortgages upon respondents' lands and water right appurtenant thereto, which the respondents Ottmuller and Parks have fully paid, and the lien held by the United States was released, and after the execution of a contract by the Sunnyside Valley Irrigation District with the United States whereby it agreed to pay all construction, operation and maintenance charges, the Secretary of the Interior released all charges on all of the lands, including the Fox land. There is not one word in the Reclamation Act that intimates that the United States has authority to lay the foundation upon which the right contemplated by the Act is founded. The purposes of the act was to make it possible for the United States to advance the costs of construction of a project and that the United States would have a mortgage upon the lands and water rights in the project for the estimated

cost, as fixed by the Secretary of the Interior, and that when the construction charges on a major portion of the lands had been paid, the management and operation of the irrigation system should pass to the owners of the land irrigated and would be maintained at their expense.

The foregoing construction is clearly evidenced by the terms of the contract between the Sunnyside Water Users' Association and the United States, May 7, 1906 (Fox and Ottmuller 12, Parks 11), which recites that the respondents *"must initiate the rights to the use of the water* from said proposed irrigation works * * *, which *right shall be* and thereafter continue to be *forever appurtenant* to the designated lands" of the respondents. The water right application provides that "the applicant hereby *applies for a water right* * * * to be used for the irrigation of, and *appurtenant to"* respondents' lands and provides that the United States shall have a lien in the nature of a mortgage upon the land and *"all water rights now or hereafter appurtenant or belonging thereto* and all improvements now existing or hereafter made thereon" and pro-

vides for non-forfeiture of the right acquired after full payment (Fox 16, 17, Ottmuller 16, 17), pursuant to the terms of the Act (43 USCA 431).

The reclamation law, contract with the Sunnyside Water Users' Association, water right applications and supplemental water right contract are all in harmony with the territorial laws, Constitution of the State of Washington, statutes and judicial decisions of that state and which were the law of that state at the time of the making of the water appropriations, construction of the reservoirs and irrigation system for respondents' lands. The territorial legislature by act approved November 13th, 1873 (Session Laws 1873 p. 520) provided that beneficial use of the water was the basis and the measure of the right. This act remained the law with reference to respondents' rights until the same were re-enacted in the Water Code in 1917 (Session Laws, 1917, Chap. 142, Sections 1, 31, and 39). The courts have repeatedly held that where a water right for irrigation was acquired it did "become a part of the land" (Ament vs. Bickford, 139 Wash. 494, 495), and was appurtenant thereto (Geddis vs.

Parish, 1 Wash. 587, Tedford vs. Wenatchee Reclamation District, 127 Wash. 495, 499); that "the right to the flow of water to be used upon land, whether in its *natural state* or *through pipes from a reservoir* * * * for the use upon the lands are considered appurtenant to the land and therefore realty" (Madison vs. McNeal, 171 Wash. 669, 675, 676); that "it is an elementary principal of the law of appropriation of the waters for irrigation, that the first appropriator is entitled to the *quantity of water appropriated* by him" and that, "where a valid appropriation is made, *the right*, according to all the authorities, becomes vested" (Longmire vs. Smith, 26 Wash. 439, 447); that under the law as it existed when the water was first beneficially used upon respondents' lands, the right to the use of the water or water right was acquired without any other procedural requirements (In re waters of Crab Creek and Moses Lake, 134 Wash. 7, 14, 15); that when "this right is being trespassed upon, the owner thereof should be protected from such acts" (Ament vs. Bickford, 139 Wash. 494, 495).

The title to and management and operation

of the reservoirs and the works necessary for the protection and operation is in the Government, but the ownership of the waters impounded therein and the title to those waters are vested in the public or state and the only right that can be acquired by anyone (including the United States, which have no greater rights than a private individual or corporation, Chap. 88, Session Laws of 1905) in and to those waters for irrigtaion purposes, under the law of the State of Washington as provided by the Constitution, legislative enactments and judicial decisions and by Section 8 of the Reclamation Act (43 USCA 372) is by the "beneficial use * * * of the water acquired" upon the land for agricultural purposes and when the water is so applied, the title to "the right to the use of water acquired" is in him who applies the water to such use.

The foregoing rule and the reason for the rule was clearly stated by the court in Proctor vs. Sim, 134 Wash. 606, 614, where the question at issue was the ownership of the waters of Duck Lake, a non-navigable lake, where the bed and land surrounding the lake was owned by an individual, the court after reviewing the

statutory and constitutional provisions and the Water Code, gave the rule and the reason for the rule in the following language:

> "This declaration to the effect that all waters within the state belong to the *public is but an echo of legislative enactments which have existed in this state for many years, as we will later show.* When it is considered that a large portion of this state is arid and that its growth and development depend greatly upon the use of the waters on the lands therein, *it was most natural that the state from the beginning should have laid claim to the waters within its boundaries, in order that it might facilitate the reclaiming of its arid lands.*

The Secretary of the Interior is authorized to carry out the provisions of the reclamation law. No authority is, or could be, conferred upon him to issue public notices and orders overriding the Constitution of the United States, acts of Congress, statutes and judicial decisions of the State of Washington. Respondents take the position that the acts of the Secretary of the Interior in issuing, and the acts of the petitioner in enforcing the public notices

and orders sought to be vacated, was an invasion and trespass upon their property rights and that the petitioner should be restrained, whether he professes to be acting for the government or not. Neither the petitioner nor the Government he represents could trespass upon the property of the respondents. By reason of their illegality, the petitioner's acts in the enforcement of the public notices and orders are personal and derive no official justification from his doing them in asserted agency of the Government. There is a difference between an injunction against the illegal seizure of the property rightfully possessed and against the cancellation of a contract which involves no change of the possession. The Government is not responsible for the wrongs of the petitioner in the enforcement of these orders and the only relief that can be obtained is by these suits for the Government could not be made a party defendant and there is no relief under the Tucker Act, for there is involved no breach of contract by the United States.

ARGUMENT

THE SUBJECT MATTER OF THESE SUITS IS "THE RIGHT TO THE USE OF THE WATER ACQUIRED" BY RESPONDENTS FROM THE NATURAL FLOW AND IMPOUNDED WATERS OF THE YAKIMA RIVER, COMMONLY KNOWN AS WATER RIGHTS, WHICH RIGHTS ARE VESTED IN RESPONDENTS AND THEREFORE THEY INVOLVE NEITHER CONTRACTS WITH, NOR PROPERTY INTERESTS OF THE UNITED STATES AND IT IS NOT A NECESSARY PARTY DEFENDANT.

Government counsel for petitioner have referred to the *corpus of the water* and the *right to the use of the water acquired,* by respondents, as synonymous terms, and take the position that these suits are based solely upon executory contracts for the sale by the United States and purchase by the respondents of the *corpus of the water,* which is *owned by the United States,* for counsel state:

> "By virtue of these water right applications and contracts, respondents' predecessor became entitled to receive *designated amounts of water* from the

United States under specific conditions." (Pet. Br. p. 4).

"In substance and effect suits to compel *specific performance of the contracts* to which the United States is a party and to *affect property in which it has an interest.*" (Pet. Br. p. 9).

"It is plain that under the statutes and decisions of Washington, which cover the appropriation of waters now in question, that the *United States in storing* and distributing the water, *is the sole owner and appropriator of the water* and that the *respondents have no right to the water* apart from the contract obligations of the United States." (Pet. Br. p. 10).

"These suits seek relief against the petitioner, which amounts to a mandatory injunction that the petitioner deliver to the respondents the same *amount of water* as was delivered prior to the completion of another division of the Yakima Reclamation Project." (Pet. Br. p. 11).

"The respondents, we believe, *have no rights* whatever apart from their contracts with the United States. In asserting a *property right in the water* re-

spondents lay claim to *property claimed by and in the possession of the United States.*"

"It seems clear that respondents have no claim whatever save that which rests upon the *contracts with the United States, the sole appropriator and owner of the water rights.*" (Pet. Br. p. 28).

"But also seek to interfere with the operation and management of the reservoirs and distribution system of the United States." (Pet. Br. p. 32).

Based upon these premises they have reached the conclusion that these suits relate to the natural flow and impounded waters of the Yakima River, which is the property of the United States and that such suits are based solely upon executory contract for the sale by the United States and purchase by respondents of *water,* therefore, it is an indispensable party defendant and these suits must be dismissed, which if granted by this court, means that there is no judicial forum where these illegal and void orders, which were arbitrarily and capriciosuly promulgated and enforced without the exercise of an honest judgment, to coerce and force the respondents and other

water users in the Sunnyside Division to pay $1,000,000.00 of the costs of the construction of the Cle Elum reservoir, to furnish waters for new divisions, in positive violation of four express provisions of the reclamation law, can be reviewed or vacated in furtherance of justice, and that the respondents, as owners of "the right to the use of the water acquired under the provision of the reclamation law" have no rights which the petitioner must respect and which he cannot destroy by an edict in the form of a public notice and order, which, of course, means that if petitioner has the power to deprive respondents of 40% of their rights to "the use of water acquired under the reclamation law," then he can deprive them of 100% of their rights and can also deprive other water user on the Sunnyside division and on every other Federal reclamation project of 100% of their rights to the use of water acquired under the act, destroy their land for farming purposes, for the land without water has no value, the security upon which the respondents and other water users depend for their livelihood and upon which security millions of dollars have been loaned by the Federal Land

Bank and Land Bank Commissioner to the individual farmer and on which millions of dollars have been loaned by the Reconstruction Finance Corporation to irrigation and drainage districts, destroy the value of the property in the cities and towns that have grown up as the result of "the use of the water" upon the arid and valueless land, destroy the hope of a livelihood of the tillers of the soil, who have, by the sweat of their brow, carved out of the great American Desert, their farmsteads in which they have invested their life savings and the fruit of years of toil, dirve them from their homes with their hopes and aspirations and faith in their Government blasted, which would be one of the saddest pictures in the history of the development of the West.

There is no breach of the contract between the United States and the respondents upon which to base a suit under the Tucker Act, for the United States, by the construction of the reservoirs of adequate capacity to store sufficient water to beneficially and successfully irrigate respondents' lands and all other lands in the division has fully complied with all contract obligations and the respondents Ottmuller and

Parks, having fully paid the United States their proportionate share of the costs as fixed by the Secretary, pursuant to the reclamation law, and the Secretary having released all liens upon the Fox land for construction, operation and maintenance charges after the Sunnyside Valley Irrigation District entered into a contract with the United States in 1918 by the terms of which it assumed and agreed to pay all charges, the government has no lien upon the Fox land. The United States is not suable in an action of this nature and even if it had consented to be sued, there is no basis for an action against it. The promulgation and enforcement of these orders and notices are personal and derive no official justification for the petitioner enforcing them in asserted agency of the government, and for this reason no suit would lay against the United States, even if Congress had authorized suit of this nature to be brought.

Section 8 of the Reclamation Act (43 USCA 372) describes the subject matter of these suits in the following language: "*The right to the use of water acquired* under the provisions of the reclamation law." The contract between

the Sunnyside Water Users' Association and Secretary of May 7, 1906 (Fox and Ottmuller 12, Parks 11), used the following language with reference thereto: "must initiate *rights to the use of water* from the said proposed irrigation works * * * applicants *for the right to the use of water* * * * the *rights* of the members of the association *to the use of the water* where the same have vested." The water right application provides that the applicant "applies for a *water right*" (Fox and Ottmuller 16). The same provisions are contained in the supplemental water right contract in the Parks case, for it provides that the contract shall serve for the purpose of a water right application (Parks 17).

The Washington Territorial Legislature, Act November 13, 1873 (Session Law of 1873, p. 520, Sec. 1) defines it as the right "to the use and enjoyment of the waters of the streams and creeks." The State Constitution, adopted in 1889 (Art. 21, Sec. 1), defines it as "the use of the waters of this state." The first legislature (Session Laws, 1889-90, p. 706) defined it as the right "to take from any natural stream or lakes of this state," and the Act of 1891 (Laws

of 1891, p. 327, Sec. 1) upon which the petitioner relies, defines it as "the right to the use of the water." The Water Code, the last Legislative expression (Session Laws 1917, Chap. 117), defines it as "any right thereto, or to the use thereof."

The courts have referred to this as "the right to the use of water" (Miller vs. Lake Irrigation Company, 17 Wash. 447, 451; Benton vs. Johncox, 17 Wash. 277, 290; in re Waters of Crab Creek and Moses Lake, 134 Wash. 7, 12, 13) and also "the right to the flow of water" (Madison vs. McNeal, 171 Wash. 669, 675) and in conveyances and common use it has been referred to as a "water right" (Geddis vs. Parish, 1 Wash. 587, 591; Ament vs. Bickford, 139 Wash. 494, 495; Madison vs. McNeal, 171 Wash. 669, 675, 676); and this court in reviewing the law of the water rights as established by local rules and customs and the legislation and judicial decisions of the arid land states, referred to it as "the right to the use of water." (California Oregon Power Company vs. Beaver Portland Cement Company, 295 U. S. 142, 147).

From the foregoing it is evident that the subject matter of these suits is *"the right to the*

use" of the natural flow and impounded waters of the Yakima River acquired by respondents and their predecessor in title *"under the provisions of the reclamation law,"* pursuant to the appropriation and irrigation laws of the State of Washington (State of Nebraska vs. State of Wyoming, 295 U. S. 40, 42). The most satisfactory definition that I have found of a water right is given by Judge Phillips in Murphy vs. Kerr, 296 Fed. 536, 541, as follows:

> "The right to divert water from a natural stream by artificial means and apply the same to some beneficial use."

The water rights in question were acquired by appropriation. The clearest statement that I have found as to what is necessary in order to make an appropriation of water is given in Simons vs. Inyo Cerro Gordo Mining Company, 192 Pac. 144, as follows:

> "To constitute a valid appropriation of the water, three elements must always exist, first, an intent to apply it to some existing or contemplated beneficial use, second, an actual diversion from the natural channel by some mode sufficient for the purposes, and third, an applica-

tion of the water, within a reasonable time, to some beneficial use."

The foregoing definitions quite accurately give the necessary elements in order to acquire by appropriation water rights according to the legislation and judicial decisions of the arid land states, and as I will point out, are recognized in the Reclamation Act and the rules and regulations promulgated under which the predecessors in title of the respondents acquired the water rights which are the subject of these suits.

The water right is a completed appropriation of "the right to the use of water," nevertheless, the last element in the description of an appropriation of the water and in the definition of a water right is the same and meant in these suits, the actual application of the water upon the land by the predecessors in title of respondents more than twenty years ago for agricultural purposes. The State of Washington is the only party that could contest the validity of the water appropriations upon respondents' lands and that contest could only be upon the ground that respondents are not beneficially using the water thereon for agricultural pur-

poses. The fact that respondent Fox, to the extent of 4.84 acre feet, Ottmuller to the extent of 5.56 acre feet and Parks to the extent of 6 acre feet, have used this amount of water beneficially upon their land for agricultural purposes in the raising of crops, is admitted (All the allegations of amended bills are admitted by motions to dismiss, Ickes vs. Virginia-Colorado Development Co., 295 U. S. 639, 646). There is no suggestion in the record that the state is contesting the respondents' rights.

The first element necessary to make a valid appropriation, "an intent to apply to * * * beneficial use," could not be accomplished by the United States under the Reclamation Act, for it does not authorize the Secretary of the Interior to engage in the irrigation of lands for agricultural purposes on the part of the United States. This being true, any act of the Secretary of the Interior in connection with the acquirement of the respondents' water rights was for the respondents and not for the United States. It was the intent of respondents' predecessors in title to apply the water to a beneficial use. This fact is evidenced by the provision in the contract between the Sunny-

side Water Users' Association and Secretary of the Interior, May 7, 1906, wherein they were required "to initiate rights to the use of water from said proposed irrigation works, to be constructed by the Secretary of the Interior as soon as such rights may be initiated, and thereafter complete the acquisition thereof" (Fox and Ottmuller 13, Parks 11). By this provision respondents' predecessors in title were required to initiate, that is, declare their intent to apply the impounded waters for agricultural purposes upon their lands and to "complete the acquisition" of the water rights by the beneficial use of the water upon their lands for agricultural purposes.

It is evident that the intention to apply the natural flow and impounded waters of the Yakima River and the actual application of the same for beneficial use in the irrigation of respondents' lands for irrigation purposes was never conferred upon the United States by Act of Congress, and that it was necessary for the respondents' predecessors in title and respondents in order to enjoy these rights to comply therewith.

Under the law of the State of Washington as

construed by the courts of that state (in re Waters of Crab Creek and Moses Lake, 134 Wash. 7), the court expressly held that a water right could be acquired by the beneficial use of the water upon the land without the compliance with the precedural requirements of the statute law of the State of Washington (Session Laws 1891, p. 327), and also held that this right became vested as soon as the water was beneficially used upon the land (Longmire vs. Smith, 26 Wash. 439, 447).

Government counsel take issue with the holding of the eminent and able Justice Van Orsdel, in the following statement made by him in the opinion in the lower court:

> "It is settled irrigation law that mere diversion and storage of water does not constitute an appropriation. Before there can be an appropriation the water must be applied to a beneficial use. Highland Ditch Company v. Union Reservoirs Company, 127 Pac. 1025. In Paine Irrigation District v. Board of Commissioners, 236 Fed. 790, the court, considering constitutional and statutory provisions similar to those of the State of Washington, held that under the Constitution and

> statute relating to water rights, as construed by the Supreme Court of the State, no property right can be acquired in the use of water until it is applied to a beneficial use. The owner of the carrying ditch gets no title or right to the use of the water and has no property in it subject to disposal, but such property right of disposal is in him who applies the water to beneficial use," (Parks 50).

and take the position that the law of Colorado is different from the law of Washington, and for that reason, the court was in error, when it stated that the "constitution and statutory provisions similar to those of the State of Washington" are in force in Colorado.

Section 5 of Article 16 of the Colorado Constitution declares that the waters of every natural stream is the property of the public, which is the identical construction placed upon the Washington constitution (Art. 21, Sec. 1) and statutes of the State of Washington (Session Laws 1891, p. 327) by the Supreme Court of that state (Proctor vs. Sim, 134 Wash. 606); and Sec. 6, Art. 16 of the Colorado Constitution provides "that the right to divert non-navigable waters of any stream for beneficial use shall

never be denied. Priority of the appropriation shall give the better right, as between those using the waters for the same purposes." The foregoing is but a summary of the irrigation and appropriation laws of the Territory of Washington (Laws 1873, p. 520), which were continued in force by Sec. 24 of the Enabling Act (Vol. 1, p. 343, 344, Rem. Rev. Stat.) and page 94 of the Session Laws of 1889-1890, and the subsequent enactments (Session Laws 1891, p. 327) and re-enacted in Water Code (Session Laws 1917, Chap. 117), and conclusively prove that the statement made by the lower court was upon constitutional and statutory provisions similar to those which were in force in the State of Washington at the time of the appropritaion of the waters and construction of the reservoirs in which the same were impounded, therefore the authorities cited and the rule stated, are directly in point.

The foregoing is supported by the conclusion reached in a comprehensive and carefully considered decision by this court of certain elementary and fundamental rules in connection with "the right to the use of water" or water rights in the arid land states in the case of Cal-

ifornia Oregon Power Company vs. Beaver Portland Cement Company, 295 U. S. 142, 155, 157, when the court stated:

> "The effect of these acts is not limited to rights acquired before 1866. They reach into the future as well, and approve and confirm the policy of *appropriation for a beneficial use*, as recognized by local rules and customs and the legislation and judicial decisions of the arid land states, *as the test and measure of private rights* in and to the non-navigable waters of the public domain. Jones vs. Adams, 19 Nev. 78, 86, 6 P. 442, 3 Am. St. Rep. 778; Jacob v. Lorenz, 98 Cal. 332, 335, 336, 33 P. 119."
>
> "In respect of the area embraced by the desert land states, with the exception of a comparatively narrow strip along the Pacific seaboard, it had become evident to Congress, as it had to the inhabitants, that the future growth and well-being of the entire region *depended upon a complete adherence to the rule of appropriation for a beneficial use as the exclusive criterion of the right to the use of water.*"

The foregoing statements are amply sup-

ported by the judicial decisions of the arid land states, where the questions involved have been under consideration by the courts, save and except in California where by the constitution of 1879 and 1911, water could be appropriated for sale, and the following are some of the decisions which support the rule: Rock Creek Flume and Ditch Company vs. Miller, 93 Mont. 248, 89 A. L. R. 200, 203, 204; Custer vs. Missoula Public Service Commission, 91 Mont. 136; Verworf vs. Lowe, 75 Mont. 571; Salt Lake Water Company vs. Salt Lake Power Company 61 L. R. A. 648, 659; Madison vs. McNeal, 171 Wash. 669, 670, 675; Proctor vs. Sim, 134 Wash. 606, 615. Statements in Dunsmuir vs. Port Angeles Gas Company, 24 Wash. 104, 114, and in Methow Cattle Company vs. Williams, 64 Wash. 457, 460, are merely dictum, having been expressions of the court upon a point not involved in the opinion, and, therefore, do not come within the rule of stare decisis (Humphries Executors vs. United States, 295 U. S. 602, 626). The other Washington authorities cited do not touch the questions involved.

The foregoing was recognized by the House Committee in its report upon the bill when

the only right provided for was "the *water rights* acquired under the provisions of the act shall be * * * *founded on* and limited by *beneficial use*" and in the act itself, which provides "*beneficial use shall be the basis* * * * *of the right* * * * to the use of water acquired under the provision of the reclamation law *.

The second element necessary to make the appropriation, according to the definition, was "an actual diversion from the natural channel by some sufficient mode, sufficient for the purposes" and in definition of a water right "by artificial means." The Reclamation Act was enacted for the express purpose of providing the artificial means sufficient to take the water from the natural stream or channel by some sufficient mode so that the water user could beneficially apply the same upon his land for agricultural purposes.

Pursuant to the terms of the act, the Secretary of the Interior in the instant cases, approved the Sunnyside division of the Yakima project, acquired the Sunnyside Canal and water appropriations from the Washington Irrigation Company, constructed reservoirs of suffi-

cient capacity to impound the necessary waters and constructed the irrigation system of sufficient capacity to furnish "the use of water acquired" by respondents under and pursuant to the irrigation and appropriation laws of the State of Washington, for the purpose of irrigation and making their "said land available for agricultural purposes to the full extent of the soil thereof," which the Secretary of the Interior, prior to 1914 determined pursuant to Section 3 of the contract between the Sunnyside Water Users' Association and the Secretary of May 7, 1906 to be 4.84 acre feet for the Fox land, 5.56 acre feet for the Ottmuller land and 6 acre feet for the Parks land. The Secretary ascertained that the amount required to return to the reclamation fund the total cost to the United States would be $52.00 per acre for the irrigable land of the class of Fox and Ottmuller and $10.00 per acre for a supplemental water right to the class of lands of Parks, and pursuant to the Act fixed these sums, and issued a public notice as to the Fox and Ottmuller land, stating that the construction charges would be $52.00 per acre. Thereafter the predecessor in title of the Ottmuller

and Fox entered into water right applications by the terms of which the then owners agreed to pay these amounts of construction charges and that the United States had a lien on the land, water right then or thereafter to become appurtenant and all of the improvements thereon or thereafter placed thereon, as security for the payment of this amount, which was in the nature of a mortgage or deed of trust, with authority in the Secretary of the Interior to sell the land for non-payment, paying all sums due to the United States into the reclamation fund and the remainder, if any, to be the property of the owner of the land. Respondents Ottmuller and Parks fully paid all construction charges and the lien was released and satisfied. The Sunnyside Valley Irrigation District was incorporated under the laws of the State of Washington, and in 1918 it entered into contract with the United States, by the terms of which it assumed and agreed to pay all construction, operation and maintenance charges. Thereafter the Secretary released all liens upon the Fox land and all other lands in the district.

Certainly it was not the intention of Con-

gress as expressed in the Reclamation Act, nor of the contract between the Secretary and the Sunnyside Water Users' Association, water right applications or supplemental water right contract that the United States had title to either the water or water rights, for if it was the intention that the United States had acquired and would retain title to the water, or acquired title to the water right, then the act, contracts and water right applications made pursuant thereto would not have required the execution by the predecessors in title of the respondents of a mortgage upon respondents' lands and the water rights appurtenant thereto. The water without the land had no value and the land without the water had no value. "The right to the use of water acquired" by respondents gave value to their lands. A lien in the nature of a mortgage upon these lands with the water right appurtenant thereto and all the improvements placed thereon by respondents and their predecessors in title gave the maximum protection to the United States for all moneys advanced by it pursuant to the terms of the Reclamation Act.

The premise upon which the government

counsel rely and in particular when they make the following statements: "the United States in storing * * * water, is the sole owner and appropriator of the water * * * respondents have no rights to the water apart from the contract obligations of the United States * * * the United States, the sole appropriator and owner of the water rights" is fully and completely answered in the case of Ament vs. Bickford, 139 Wash. 495, in which case the predecessor in title of Ament purchased from the predecessor in title of Bickford, a parcel of land, together with a perpetual right to an amount of water definitely measured. After many years' observance and in 1925, Bickford interfered with Ament's rights and "destroyed the water connections and shut off the supply" the court said: "the appellant (Ament) bought a *water right* which was intended to, and which *become a part of the land. This right* is being trespassed upon, and the appellant should be protected from such acts. Justification for the judgment (of the trial court, which was reversed) is sought in the argument * * * that the covenants are merely personal. The *contract did more than*

create covenants; it transferred property." The claim was made that the contract was void and unenforceable, and *"that the water owned by the grantor* was subject to regulation by the Public Service Commission. No merit is found in this claim *for the purchase was not of water from a water system, but of a certain definite water right.*" Dickinson vs. Dick, 151 Pac. 441, is directly in point, in which case the court held that the contract was not executory but executed and that the title to the water right passed to the purchaser.

The fact that Secion 6 of the Reclamation Act provides "that the title to and the management and operation of the reservoirs and the works necessary for their protection and operation shall remain in the Government until otherwise provided by Congress" is wholly immaterial on the issues involved, for the property right of respondents to *"the use of the water acquired under the reclamation law,"* or the water right, is separate and distinct from the property right in the reservoirs and works necessary for their protection. Murphy vs. Kerr, 296 Fed. 536, 544; Snow vs. Abalos, 18 N. Mex. 681, 140 Pac. 1044, 1048.

This question was squarely before the court in Proctor vs. Sim, 134 Wash. 606, where the court held that the ownership of the bed, shores and land surrounding a non-navigable lake did not confer ownership in the waters of the lake. Proctor, the owner of the bed, shores and land surrounding Duck lake, brought suit against Sim to recover *"for the value of water"* taken from the lake by Sims by means of a pumping plant to irrigate an orchard on Sim's land which did not border on the lake. The court denied recovery for the value of water taken by Sims for the reason that Proctor did not own the water of the lake but that the title to the same was in the state, and after referring to the constitutional and statutory provisions gave the reason why Proctor did not own the water of the lake, as follows:

> "When it is considered that a large amount of this state is arid and that its growth and development depend greatly upon the use of the waters on the lands therein, it was most natural that the *State* from the beginning should have *laid claim to the waters* within its boundaries, in order that *it might facilitate the reclaiming of its arid lands.*"

The cases of United States vs. Union Gap Irrigation Company, 209 Fed. 274, West Side Irrigation Company vs. United States, 246 Fed. 212, and Ide vs. United States, 263 U. S. 497, cited and relied upon by the petitioner, are in harmony with the theory of the respondents. United States having made certain water appropriations for *"the reclamation and cultivation of all the lands within the project"* in the Ide case, which of course meant for the benefit of the owners of those lands, for it was not the intention of the reclamation law that the United Sates would actually engage in the reclamation and cultivation of the land, but that this would be done by the owner of the land for whom the appropriation was made by the United States. Certainly the owners of the land in the projects for whom the appropriations were made in the cited cases had certain rights which they were entitled to protect as against hostile claims by third parties. The United States having the right to make the appropriation for the land owners certainly had the right to protect the same against the claims of the third parties. The United States also had the duty in Ide case, to protect the appropria-

tion "*for reclamation and cultivation of all the lands within the project*" for which lands the appropriation was made, and in so doing, protect the individual water user on the project for whom it was acting. There is another reason why the United States was directly interested. It had advanced the funds with which to construct the project and had accepted a lien in the nature of a mortgage upon all the irrigable land within the project and "the right to the use of the water acquired" by the water users in those projects as security for the moneys so advanced by it. The land without the use of water had no value. The security upon which the United States advanced the money to construct the project was "*the right to the use of the water acquired*" by the water users in those projects. This right was dependent upon the appropriation made by the United States for the water users, against which the hostile claims of third parties were asserted in each of the above cases.

The natural flow and impounded waters of the Yakima River is not respondents' property; but their rights to use that water, based upon the appropriation made by the Northern Paci-

fic, Yakima and Kittitas Irrigation Company, on the 22nd day of April, 1891, subsequent appropriations made by the United States for them, based upon their beneficial use of the water for agricultural purposes is a property right (Johnston vs. Little Horse Creek Irrigation Company, 13 Wyo. 209, 110, Am. St. Rep. 986, 992) and as such is entitled to protection (Ament vs. Bickford, 139 Wash. 464, 465; California Oregon Power Company vs. Beaver Portland Cement Company, 215 U. S. 142, 154). No hostile claim to those water appropriations are waged in these suits. If the Kittitas Reclamation District were before this court asserting its right to the use of the water which was appropriated for respondents' lands, then a similar issue would be involved. The trial court correctly stated the purpose of these suits, as follows:

> "That the orders made by the defendant are not authorized by Congress, and had they been so authorized would have deprived the plaintiffs of vested rights. The suits are not brought against the United States, but to set aside unauthorized acts of the defendant in cases in

which he has no discretionary powers and is acting arbitrarily." (Parks 23).

The case of State of Arizona vs. State of California strongly relied upon by government counsel is upon entirely different facts from those in these suits and entirely different legal questions are raised. The pivotal point upon which the decision that the United States was a necessary party, rested, is found in the following statement by the court: "The Colorado River is a navigable s t r e a m of the United States. The privilege of the states through which it flows and the inhabitants to appropriation and use of the water, subject to the paramount power of the United States to control it for the purpose of improving navigation." That suit involved the corpus of the water of a navigable river and among other things the relief asked was "that the quantum of Arizona's equitable share of the water flowing in the Colorado River, subject to diversion and use, be fixed by this court, and that petitioner's title thereto be quieted" and sought "in advance of any act of appropriation" either by her citizens or by the state to partition the waters, for the court said: "The decree sought

has no relation to the present use of the water thus impounded which infringes rights which Arizona may assert subject to the superior but unexercised powers of the United States." It is evident that the suit referred to the corpus of the water of the Colorado River, a navigable stream, and to partition the waters between the State of Arizona and State of California, subject to the paramount right of the United States in and to those waters, where the state of Arizona as a sovereign state or her citizens had no present rights in and to the unappropriated waters of the Colorado River. Title to vested water rights were not involved. The Arizona case does not touch the issues involved in these suits in the slightest degree and to extend the doctrine that the United States has the paramount right over the navigable waters to waters from non-navigable streams impounded in reservoirs pursuant to the terms of the Reclamation Act would mean the overriding of Sec. 6 of that act (43 USCA 383) and also over-ruling the decision of this court in the case of State of Nebraska vs. State of Wyoming, 295 U. S. 40, 42, and also the fundamental and elementary doctrine of water

rights, which are embodied in legislative enactments and judicial decisions of the State of Washington.

The purpose of the suit in the American Falls Reservoir District No. 2 vs. Crandall, 82 Fed. (2nd) 973, was to require the physical delivery of the natural flow water which had been appropriated by and decreed to the United States, the opinion of the court stated:

> "In 1933, no natural flow water was delivered appellant district, whereupon appellant filed this *suit to require delivery to it of the natural flow water* to the extent of the capacity of the main canal, serving its district, which had been 1550 second feet."

The court in the opinion quoted from 43 USCA, Sec. 373, and stated: "If this suit be considered one for the enforcement of purely administrative duties, such *as the assessment of the charges of construction, the United States would not be a necessary party.*" The purpose of these suits is to vacate, set aside and annul certain illegal and void public notices and orders, which the petitioner seeks to enforce to collect $1,000,000.00 construction charges. Cer-

tainly if the United States is not a necessary party with reference to the assessment of the charges for construction legally made, it is not a necessary party with reference to restrain the illegal assessment of construction charges.

PUBLIC NOTICES AND ORDERS SOUGHT TO BE VACATED ARE A NULLITY.

Respondents take the position that the petitioner is bound by the provisions of Congressional legislation and that he must find statutory authority for the promulgation and enforcement of the public notices and orders in question, and in default of such warrant, he may be enjoined.

The case of United States vs. State of Arizona, 295 U. S. 174, was an action by the United States against the State of Arizona to enjoin interference by the state with the construction of the Parker Dam by the Secretary acting for the United States. Arizona used military force to stop the work. This court denied the injunction and stated: "It follows that the construction of the dam has not been authorized as required by the Reclamation law," and held that the Secretary had no authority to proceed.

The public notices and orders sought to be vacated are not authorized by the reclamation law, but are in positive violation of the express terms of that law, in four particulars, three of which are the most elementary and fundamental principles of *"the right to the use of water acquired"* by appropriation, which have been the settled law in the arid land states from the initiation of that doctrine to the present time, by rules, custom, legislation and judicial decisions, and recognized by Congress in the Act of July 26, 1866, and also in the Reclamation Act of June 17, 1902, and are also in violation of the Federal Constitution, legislation and judicial decisions of the State of Washington, because the effect of these notices and orders is to:

I. CHANGE THE MEASURE OF RESPONDENTS' RIGHT TO THE USE OF WATER FROM *"BENEFICIAL USE"* AS FIXED BY THE RECLAMATION LAW, CONTRACTS AND WATER RIGHT APPLICATIONS, LEGISLATION AND JUDICIAL DECISIONS OF WASHINGTON, CUSTOM AND PRACTICE ON ALL FEDERAL RECLAMATION PRO-

JECTS AND DETERMINATION MADE BY FORMER SECRETARY OF INTERIOR.

The purpose and effect of the public notices and orders sought to be vacated is to change the measure of a water right from *"beneficial use"* arbitrarily to three acre feet (Ottmuller 30, Fox 37) and three and one-half acre feet (Parks 29) for the basic public notice of October 17, 1930, contains the following order:

> "Notice is hereby given that as to all lands except those referred to in paragraph (c) (Parks land), during the year 1931 and subsequent years, until further notice, water deliveries in that district *will be limited to three (3) acre feet* per irrigable acre per year." (Fox 47, Ottmuller 44).

and to three and one-half acre feet on Parks land (Parks 29).

If these notices and orders sought to be vacated are enforced, the respondents Ottmuller and Parks will be deprived of about 40% of their water rights (2.56 acre feet in the Ottmuller case and 2.50 acre feet in the Parks case) the absolute title to which water right is vested in them and permanently attached to their lands (43 USCA 431) (Ottmuller 30,

Parks 29), and respondent Fox will be deprived of about 40% of the water right in which he has a vested interest (Fox 37).

(a) Sec. 8, Reclamation Act of June 17th, 1902 (43 USCA 372), in clear language makes *beneficial use* the yardstick with which to measure a water right on a Federal irrigation project in the following words:

> *"Water right appurtenant to land and extent of right. The right to the use of water* acquired under the provisions of the reclamation law shall be appurtenant to the land irrigated, and *beneficial use shall be the basis, the measure,* and the limit of *the right."*

(b) All contracts and water right applications make beneficial use the measure of respondents' water rights.

Prior to the construction of the reservoirs and irrigation system by the United States, the respondents and other land owners were required to incorporate the Sunnyside Water Users Association, and place their lands in the project, and it was necessary for this association to enter into a contract with the United States (Fox 33, Ottmuller 25). This contract,

respondents' Exhibit "A" attached to the amended bills (Fox and Ottmuller 12 to 16, Parks 11 to 14) fixed beneficial use as the measure of the "right to the use of water" in the following words:

> "And to be based upon and *measured* and limited by the *beneficial use of water* * * * That in all the relations between the United States and this association and the members of the association, the *rights* of the members of the association *to the use of water where the same have vested, are to be defined, determined and enjoyed* in accordance with the provisions of said *Act of Congress* and other acts of Congress on the subject of *the acquisition and enjoyment of the rights to the use of water,* and also by the *laws of the State of Washington.*"

The water right application in the Fox case makes *beneficial use* as the measure of the right to the use of water, in the following words

> "The *measure of the water right for said land is that quantity of water which shall be beneficially used for the irrigation thereof,* but in no case exceeding the share proportionate to irrigable acre-

age, of the water supply actually available as determined by the project manager or other proper officer of the United States, or of its successors in the control of the project, during the irrigation season for the irrigation of lands under said unit." (Fox 17).

The water right application in the Ottmuller case makes *beneficial use* the measure of the right to the use of water, in the following words:

"The quantity of water to be furnished hereunder shall be 3 acre feet of water per annum per acre of irrigable land, as aforesaid, measured at the land; or so much thereof as shall constitute the proportionate share per acre from the water supply actually available for the lands under said project; provided, that *the supply furnished shall be limited to the amount of water beneficially used on said irrigable land.*" (Ottmuller 16).

The supplemental water right contract in the Parks case makes *beneficial use* the measure of the right to the use of water, in the following words:

"The amount of water to be furnished hereunder shall be 3 acre feet of wa-

> ter per annum per acre, measured at the land, or *as much more water as will be required to successfully irrigate the land,* the amount so required to be determined by the authorized agent of the United States, and the water shall be used only to irrigate said lands and for domestic purposes incident thereto; provided, that the amount of water furnished shall be limited to the amount beneficially used upon such lands." (Parks 17).

It is evident from the express provisions of the various contracts and water right applications above referred to, that the measure of respondents' water rights is *beneficial use.* Regardless of the terms of those contracts and water right applications, the provision of the Reclamation Act which gives the measure of a water right on a Federal reclamation project (43 USCA 372) must be read into every contract and water right application with the same force as though expressly incorporated therein (California Oregon Power Co. vs. Beaver Portland Cement Co., 295 U. S. 142, 143) and if there is any conflict between the provision of the Reclamation Act giving the measure of

respondents' water rights and the water right applications and contract, then the Act of Congress prevails over the part of the contract or water right application which is in conflict therewith (Hipp vs. Prudential Gas Co., 244 N. W. 347).

(c) By legislation in the Territory and State of Washington, the measure of a water right by appropriation is the quantity of water necessary for the purpose of making the land available for agricultural purposes to the full extent of the soil.

By Act approved November 13, 1873 (Session Laws 1873, p. 520) the Legislature of Washington Territory fixed beneficial use as the basis and measure of the right to the use of water acquired by appropriation in Section 1, as follows:

> "That any person * * * who may have or hold a title or possessory right or title to any agricultural lands within the limits of Yakima County, Washington Territory, shall be entitled to the use and enjoyment of the waters of the streams or lakes in said county *for the purposes of irrigation and making said*

land available for agricultural purposes to the full extent of the soil thereof."

This act was continued in force by the Enabling Act (Rem. Rev. Stat. p. 343, 344, Section 24), which provides: "All laws in force, made by said territories, at the time of their admission in the Union, shall be in force in said states, except as modified or changed by this act or by the constitutions of the states, respectively." The Enabling Act made no change in this statute, neither was it modified or changed by the State Constitution (1889) and was continued in force by legislative enactment (Session Laws of 1889-90, p. 94) and continued to be the law with respect to the basis and measure of the water rights in Yakima County, where respondents lands are located (Ottmuller 25), for a period of fifty years and until similar provisions were enacted in the water code (Session Laws, Chap. 117), in Section 31 which provides: "That where the water applied for is to be used for irrigation purposes, *it shall become appurtenant* only to such land as may be reclaimed thereby, *to the full extent of the soil for agricultural purposes*" and in Sec. 39 which provides: *"The right to the use*

of water which has been applied to a beneficial use in the state shall be and remain appurtenant to the land or place upon which the same is used." Both of the above provisions refer to natural flow and impounded waters.

A similar statute, with almost identical provision to Sec. 8 of the Reclamation Act with reference to the measure of a water right (43 USCA 372) was enacted in Utah in 1907 (Utah Compiled Law 1907, Sec. 1288x20), as follows: "Beneficial use shall be the basis, *the measure* and the limit *of all the rights to the use of water in this state.*" In the case of Salt Lake City vs. Gardner, 114 Pac. 147, the court in commenting upon the above statute stated:

> "The doctrine reflected in the foregoing statute has so often been declared the law, with respect to the appropriation of water during the last 25 years, that it has become elementary and is no longer questioned by anybody."

Similar statutes have been passed in a number of the arid land states. (Nev. Stat. 1903, page 24, Sec. 1, 1907, p. 30; N. M. Stat. 1907, Chap. 49, p. 71, Sec. 2; N. D. Stat. 1905, Chap. 34, Sec. 2; Rev. Code, 1905, Sec. 7604).

Although the State legislature of Washington gave the procedural requirements in connection with the acquisition of a water right (Session Laws 1889-90 p. 706; Session Laws 1891 p. 327), yet neither of the above statutes or any other statute enacted in Washington changed the rule fixing beneficial use as the basis and measure of the right to the use of water in Yakima County; and notwithstanding the provision with reference to the procedural requirements relative to acquisition of a water right by appropriation therein contained, the court held that the use of water for irrigation could be acquired by the actual beneficial use of the water upon the land without a compliance with the statutory requirements (In re Waters of Crab Creek and Moses Lake, 134 Wash. 7, 14, 15).

(d) The doctrine of appropriation for beneficial use as the test and measure of the water right is firmly established by the judicial decisions of the courts of the State of Washington, and arid land states and recognized by this court.

In Longmire vs. Smith, et als, 26 Wash. 439 (1901) suit was brought by Longmire against

Smith and others to quiet title to water appropriations made by him for the irrigation of farm land situate in Yakima County. Nearly all of the defendants were riparian owners upon the Wenas River. The court granted the decree quieting title and the question of the measure of the water right of Longmire was considered and the court stated:

> "It is an elementary principle of the law of appropritaion of water for irrigation that the first appropriator is *entitled to the quantity of water appropriated by him,* to the exclusion of subsequent claimants by appropriation or riparian ownership. When a valid appropriation is made, the right, according to all the authorities, becomes vested. There is an express reservation in all grants by the general government in favor of such rights. The legislature of Washington Territory in recognition and regulation of the right to the use of water in Yakima County, by act approved November 13th, 1873, defined the rights of appropriation."
>
> "Thus it will be seen that the *measure of the appropriation,* as defined by Section 1 of the Act November 13th, supra,

is the making of *said land available for agricultural purposes to the full extent of the soil thereof.*"

"However, the necessity of the issue presented is a definite measurement of the quantity of water required for the irrigation of these farm lands, and may be measured in inches where the pressure and method of measurement is given, or in the unit adopted by the statute. *The common experience in irrigating arid lands for agricultural crops in Yakima County would seem to afford a rule for the judicious application of water for lands herein. To such quantity of water the plaintiff is entitled by virtue of his prior appropriations.*"

From the experience of respondents and their predecessors in title, the amount of water required to make respondents' lands available for agricultural purposes to the full extent of the soil was ascertained by the representatives and subordinates of the Secretary "who had the physical charge of the water distribution, and from a factual investigation made by said representatives and subordinates by going upon the land from time to time, and the personal examination of the same, the

crops growing thereon, and the water requirements thereof," and from the information so obtained it was ascertained and determined by the Secretary that 4.84 acre feet for the Fox land, 5.56 acre feet for the Ottmuller land and 6 acre feet for the Parks land was required, which amount has been used thereon beneficially for more than twenty years (Fox 34, Ottmuller 27, Parks 26).

In California Oregon Power Co. vs. Beaver Portland Cement Co., 295 U. S. 142, where suit was brought by the power company to enjoin the cement company from interfering with the waters in Rogue River in the state of Oregon, the court stated, with reference to the act of July 26, 1866, Chap. 262, Section 9, 43 USCA Sec. 661, and Act of July 9, 1870, Chapter 235, Section 17, 43 USCA 661, as follows:

> "The effect of these acts is not limited to rights acquired before 1866. They reach into the future as well, and approve and confirm the policy of *appropriation for a beneficial use,* as recognized by local rules and customs, and the legislation and judicial decisions of the arid land state, *as the test and measure of private rights* in and to the non-navi-

gable waters of the public domain * * * *as the exclusive criterion of the right to the use of water.*"

(e) By custom and practical construction, previous Secretaries of the Interior have ascertained the water requirements of respondents' and all other lands in Federal reclamation projects and fixed the same at the amount of water required to make the land available for agricultural purposes to the full extent of the soil.

The rule of law stated in the Act of July 26, 1866 (43 USCA 661), "*Whenever, by priority of possession, rights to the use of water* for mining, *agricultural,* manufacturing, or other purposes, have become *vested and accrued,* and the same are *recognized and acknowledged by local customs, laws and decisions of the courts,* the possessors and *owners of such vested rights shall be maintained and protected in the same,*" for this act reaches into the future and applies to the facts in these cases for several reasons. Fox has been in possession of and has enjoyed the right to the use of water to the extent of 4.84 acre feet, Ottmuller to the exent of 5.56 acre feet and Parks to the extent of

6 acre feet, which rights accrued by the application of water to respondents' lands more than twenty years ago (in re Waters of Crab Creek and Moses Lake, 134 Wash. 7) and became vested to the extent of the quantity of water used as soon as it was applied upon their lands (Longmire vs. Smith, 26 Wash. 439, 447) and became a part thereof (Ament vs. Bickford, 139 Wash. 494, 495) whether the water was from the natural flow or stored in a reservoir (Madison vs. McNeal, 171 Wash. 675) and appurtenant thereto (Geddis vs. Parish, 1 Wash. 587, 591), which rights were recognized by custom and practical construction of the Secretary of the Interior prior to August 13th, 1914, who, from information obtained from those charged with the physical distribution of water, ascertained the amount of water necessary to make respondents' lands available for agricultural purposes to the full extent of the soil, recognized the right of the respondents to the use of water from natural flow and impounded waters of the Yakima River to that extent, and respondents are entitled to be protected in such rights according to this custom, which had been generally followed on all Fed-

eral reclamation projects (Fox 34, 38, Ottmuller 26, 31, Parks 26, 30).

(f) Determination by Secretary of Interior prior to August 13, 1914, of respondents' right to the use of water acquired pursuant to contract.

The contract entered into between the predecessors of respondents and other water users through the Sunnyside Water Users Association of May 7, 1906, in paragraph 3 makes provision for the *"determination to be made upon due and expert consideration of all available data, and to be based upon and measured and limited by the beneficial use of the water."* Pursuant to this provision "it was determined by the * * * Secretary of the Interior" * * * that 4.84 acre feet of water for the Fox land (Fox 34), 5.56 acre feet of water for the Ottmuller land (Ottmuller 27) and 6 acre feet of water for the Parks land (Parks 27) was the measure of the amount required to make respondents' lands available for agricultural purposes to the full extent of the soil.

The identical proposition was before the court in Wilbur vs. Burley Irrigation District, 58 Fed. (2d) 871, which was an action by the

district against the Secretary of the Interior for a permanent injunction to restrain him from reconsidering the ratio of ownership and the participation of the Burley Irrigation District and the Minnidoka Irrigation District in the power profits, past and future. from what is known as the Minnidoka project. A former Secretary of the Interior had apportioned the costs and profits between the two districts. It was evident that it was the intention of the Secretary of Interior to change the determination so made. Suit was brought and injunction granted and the court stated:

> "The decision of Secretary Work became, in effect, a rule of property and is entitled to all the recognition which such a consequence necessarily gives it. It is obvious that if the rule were to be changed that the rights which the Burley Irrigation District believed that it was entitled to by reason of it, and on belief of the possession of which it undoubtedly had undertaken e x p e n s i v e improvements, would be destroyed or at least seriously disturbed."
>
> "It is clear, therefore, that any attempt on the part of the present Secretary to

revise, modify, or change these contracts or to interfere with property rights already vested, is a matter over which the jurisdiction of the Secretary no longer exists."

In Noble vs. Union River Logging Co., 147 U. S. 164, 176, where the question of the power of Secretary of Interior to annul the action of his predecessor was before the court, it stated: "A revocation of the approval of the Secretary of the Interior, however, by his successor in office was an attempt to deprive the plaintiff of his property without due process of law, and was, therefore, void."

The reason why *beneficial use* has been the measure of the rights to the use of water since the initiation of the doctrine of the water right by appropriation by the miners in California after the gold strike in 1849 and has been constantly used and applied by local rules and customs and the legislation and judicial decisions of the arid land states, as the test and measure of the private rights, in and to the non-navigable waters, and declared to be "the measure * * * of the right to the use of water acquired under the reclamation law,"

and why this measure was definitely fixed by the Territorial legislature of Washington and has been consistently declared in subsequent legislation and decisions of the courts of that state, and declared to be the measure by this court (California Oregon Power Company vs. Beaver Portland Cement Co.) is because no other measure or yardstick is adequate to test and measure water rights for irrigation in the arid land states. The amount of water required to beneficially irrigate land is dependent upon and determined by many factors, such as the nature of the soil, whether sandy, gravelly, underlaid with hardpan, or a firm volcanic ash, contour of the land and whether it is level, rolling or uneven, and whether it is watered by subirrigation from irrigated lands at a higher level. The fact that the Fox land required 4.84 acre feet the Ottmuller 5. 56 acre feet, and the Parks land 6 acre feet, corroborates the foregoing statement.

After the measure of respondent Fox's water right had become fixed at 4.84 acre feet; Ottmuller at 5.56 acre feet and Parks at 6 acre feet, the petitioner has no right to curtail those rights, nor to substitute his judgment for the

will of Congress. Payne vs. Central Pacific Railroad Company, 255 U. S. 228, 236.

II. INCREASE THE CONSTRUCTION CHARGES AFTER THE SAME WERE FIXED BY PUBLIC NOTICE.

The then Secretary of the Interior, James Rudolph Garfield, pursuant to Sec. 4 of the Reclamation Act (43 USCA 419), estimated the cost of the purchase of the Sunnyside Canal, water appropriations, construction of reservoirs and irrigation system of sufficient capacity to successfully and beneficially irrigate all lands in the Sunnyside Division, including the lands of respondents and make said lands available for agricultural purposes to the full extent of the soil, and determined that $52.00 per acre would return to the reclamation fund the entire cost of the project. Thereafter and on March 2nd, 1909, he issued public notice and order covering these lands, fixing the construction charge at $52.00 per acre, which notice among other things provided:

> "The charges which shall be made per acre of irrigable land which can be irrigated by the waters from said irrigation project * * * the *building of the*

irrigation system $52.00 per acre of irrigable land." (Fox 33, 42, Ottmuller 26, 34).

Thereafter the predecessors in title of the Fox and Ottmuller lands made application for a water right (Fox and Ottmuller 16), which among other things provided that the applicant agrees "to pay for said water right the estimated cost of construction as fixed by the Secretary of Interior, namely the sum of $52.00 per acre," and the predecessor in title of the Parks land entered into a supplemental water right contract by the terms of which he agreed to pay $10.00 per acre for a supplemental water right (Parks 16).

Thereafter and prior to August 13th, 1914, reservoirs and irrigation system, together with water appropriations acquired from the Washington Irrigation Company, of sufficient capacity to furnish water rights to the extent of 4.84 acre feet for the Fox land, 5.56 acre feet to the Ottmuller land and 6 acre feet to the Parks land, and sufficient to beneficially and successfully irrigate all other lands in the Sunnyside division of the Yakima project, were constructed and completed, and *the right to the*

use of water acquired under the reclamation law to that extent became vested in respondents. Congress passed and the President approved on August 13th, 1914, the Reclamation Extension Act (Chap. 247, 38 Stat. 686) which among other things provided:

> "*No increase of the construction charges shall,* after August 13th, 1914, *be made, after the same have been fixed by public notice,* except by agreement between the Secretary of the Interior and a majority of the water right applicants and entrymen to be affected by such increase." (43 USCA 469).

On September 24th, 1914, Franklin K. Lane, the then Secretary of the Interior, pursuant to the terms of said act, issued a public notice and order which among other things, provided that there would be no increase in construction charges except as provided in the Reclamation Extension Act, which notice contains the following:

> "The *amount of the construction charge* per irrigable acre for lands for which entry under the provisions of the reclamation act of June 17th, 1902 (32 Stat. 388), or *water right applicants has*

> *heretofore been made, shall be the amount fixed in the several public notices heretofore issued for the respective lands and therein termed 'the building charge' and will not be increased* except as provided in said Reclamation Extension Act." (Fox 43, Ottmuller 40, Parks 34).

In 1930, Elwood Mead, Commissioner of Reclamation, recommended the construction of the Cle Elum reservoir at a cost of $3,500,000.00 to store water for the purpose of irrigating lands in the Kittitas Reclamation District, the canal and distribution system of said district being in the process of construction at that time, and for the purpose of furnishing water to irrigate lands in the Roza and Kennewick divisions of the Yakima project, the construction of which were contemplated at that time. He ascertained that the total cost of this reservoir would be $1,000,000.00 more than the amount which would be returned to the reclamation fund from the new divisions for which this reservoir was to be constructed. Without consulting respondents and other water users and officials of the Sunnyside Valley Irrigation District, he charged the sum of $1,000,000.00

to the Sunnyside division of the Yakima project and furnished the Secretary with information that provisions had been made for the payment of this sum. (Fox 35, Ottmuller 28, Parks 27).

Thereafter district counsel attempted to persuade the respondents and other water right applicants and water users in the Sunnyside Valley Irrigation District, to authorize the officials of the district to execute a contract with the United States to pay $1,000,000.00 additional construction charge and obligate respondents' lands and all other lands in said district to the last faithful acre to pay this sum. The respondents and other water users in the district refused to authorize this contract (Fox 36, Ottmuller 29, Parks 28). Thereafter it was agreed between the Secretary of the Interior, Commissioner of Reclamation and District Counsel that steps be taken to force and coerce the respondents and other water right applicants and water users in said district to either authorize the district to enter into contract and pay the sum of $1,000,000.00, or to force and coerce the respondents and other water right applicants and water users to sign a water rental appli-

cation or be deprived of a portion of *"the right to the use of water acquired"* and owned by them, unless they paid additional construction charges. In pursuance of this agreement they caused the Assistant Secretary of Interior on October 17th, 1930, to issue the basic public notice and order sought to be vacated, which public notice and order expressly provides that the water rental charges will be used to pay the costs of construction of the reservoir system, meaning the Cle Elum reservoir, and which notice contains the following provision with respect to the application of the water rental charges:

> *"All money* collected for the rental of such extra water *will be applied* to the payment of the unsecured portion of the *contsruction costs of the reservoir system* of the Yakima project." (Fox 47, Ottmuller 44, Parks 37).

On December 11th, 1930, the Secretary of the Interior certified to the President that the total costs of the construction of the Cle Elum reservoir was estimated at $3,500,000.00 and that $1,000,000.00 of this sum would be repaid by water rentals from the Sunnyside division of

the Yakima project, which certificate contains the following statement:

> "It is proposed to construct an earth-gravel fill storage dam located on the Cle Elum River, a tributary of the Yakima River * * * the total estimated cost $3,500,000.00 * * * of this amount * * * repayment of which will be provided as follows: * * * $1,000,000.00 *by rentals from the Sunnyside division of the Yakima project.*" (Fox 45, Ottmuller 41, Parks 35).

Pursuant to the public notices and orders sought to be vacated, Commissioner of Reclamation, District Counsel and Secretary of Interior caused respondents and other water users in the district to be notified that all water right applicants, including Fox and Ottmuller, would be required to pay a water rental for the right to the use of water in excess of 3 acre feet and that all supplemental water right contract holders, including Parks, would be required to pay for the right to the use of water in excess of 3½ acre feet, and required as a condition precedent of the enjoyment of the right to the use of water owned by respondents and other water users, in excess of these

amounts, the execution of a water rental application. (Fox 37, Ottmuller 30, Parks 29).

The Commissioner of Reclamation, District Counsel and Secretary of the Interior agreed with the representatives of the new divisions for which the Cle E l u m reservoir was constructed, that they would by means of said water rental applications force and coerce the respondents and other water right users to authorize the officials of the Sunnyside Valley Irrigation District to execute a contract to pay the United States the additional sum of $1,000,000.00 construction c h a r g e s, and-or collect from the respondents and other water right users of said unit by the subterfuge of the water rental applications, the sum of $1,000,000.00, and in the event they were unable by either of said methods to collect the same, then and in that event the new divisions for whose benefit said reservoir was constructed, would pay the same. (Fox 37, Ottmuller 30, Parks 29).

Since the promulgation of the orders and notices sought to be vacated it has been definitely ascertained by the Secretary of the Interior that the Cle Elum reservoir would cost

$1,003,000.00 less than the estimated cost made by the Secretary of Interior on December 11th, 1930, in his certificate to the President. The new districts, for whose benefit said reservoir was constructed have entered into contracts to pay additional large sums, and on account thereof there is no necessity for enforcing the orders sought to be vacated (Fox 39, Ottmuller 32, Parks 31).

If these public notices and orders sought to be vacated are permitted to stand, the respondents will be required to pay increased construction charges to the extent of about 35% of the original cost of their respective water rights and the money received will be used to pay construction costs for a reservoir constructed for the benefit of new divisions (Fox 36, Ottmuller 29, Parks 28).

III. STRIKE DOWN AND DESTROY WATER RIGHTS WHICH ARE APPURTENANT AND A PART OF RESPONDENTS' LANDS.

The contract between the Sunnyside Water Users Association and Secretary of Interior (Fox and Ottmuller 12, Parks 11) among other things, provides with reference to the water

rights to be acquired as follows: "*Which right shall be, and thereafter continue to be, forever appurtenant to the designated lands owned by such shareholders.*" The water right applications (Fox and Ottmuller 16) among other things provides: "The applicant hereby applies for a water right * * * with water supplied in pursuance thereof *to be used for the irrigation of and appurtenant to* applicant's land."

The respondent Ottmuller paid to the United States, the sum of $52.00 per acre in full payment of the construction charges (Ottmuller 28) and respondent Parks paid the United States $10.00 in full payment for a supplemental water right, and these respondents are "now the owners and holders of the fee simple title to said water right, sufficient to beneficially and successfully irrigate said land," to-wit: 5.56 acre feet Fox land and 6 acre feet Parks land of water per acre per annum; that said water right is appurtenant to the land herein described, and the absolute fee simple title to said land and water right is now vested in plaintiff (Ottmuller 28, Parks 27, and permanently attached to their lands (43 USCA 431). Respondent Fox has "paid to the United States

all sums that have accrued and become due on account of construction charges and has also paid all operation and maintenance charges assessed against the same, and that on account thereof the plaintiffs have a vested interest in a water right sufficient to beneficially irrigate said land, to-wit: 4.84 acre feet of water per acre per annum; that said water right is appurtenant to the land herein described." (Fox 35).

The effect of the public notice and order of October 17th, 1930 and other notices and orders sought to be vacated, is to strike down 2.56 acre feet of the Ottmuller water right, 2.50 acre feet of the Parks water right and 1.84 acre feet of the Fox water right, the absolute title in fee simple to the Ottmuller and Parks water right being vested in them, and Fox having a vested interest in a water right, which water rights are appurtenant to their respective lands.

The contract between the Sunnyside Water Users Association and Secretary of Interior (1906) expressly recognizes the fact that the lands to be irrigated are desert and arid and

have no value without water, for that contract contains the following statement:

> "Whereas, the lands embraced within the area proposed to be irrigated are naturally desert and arid and incapable of proper cultivation without irrigation unless the waters of the Yakima River in State of Washington, and its tributaries are impounded and the flow thereof regulated and controlled" (Fox and Ottmuller 12, Parks 11).

The court (Burbank Irrigation District No. 4 vs. Douglass, 143 Wash. 385) stated with reference to the arid lands in this state "for the land without water has no value." Three acre feet of water per acre per annum for Fox and Ottmuller land and 3½ acre feet for Parks land is not now, never has been and will not in the future, be sufficient to beneficially irrigate said lands, and would enable respondents to beneficially irrigate about one-half of their lands, leaving the other half thereof barren and nonproductive, forcing one-half to bear all construction and maintenance charges, taxes and assessments on his land. If respondents Fox and Ottmuller attempted to spread a maximum of three acre feet per acre and respondent

Parks attempted a spread a maximum of 3½ acre feet per acre over the whole tract of land, they would not have sufficient water to grow any profitable crop and their land would be completely destroyed for farming purposes, causing them to suffer irreparable loss and damage (Fox 38, Parks 30).

In Madison vs. McNeal, 171 Wash. 669, where the issue involved was the "right of the Madisons to a portion of certain waters produced by springs and dammed upon the property of McNeal and Wyatt, and to an alleged easement in the pipe line used in the delivery of such water," the court in commenting upon the rights of Madison to the water stored in the reservoir said:

> "That *the right to the flow of water to be used upon land, whether in its natural state or through pipes from a reservoir,* is treated as an incorporeal heriditament as distinguished from water alone, which is corporeal. * * * that water rights for the use upon the lands *are considered appurtenant to the land, and therefore, realty,* is declared by our statutes and prior decisions of this court. By the laws of 1891, page 328, it was

> provided that 'the right to the use of water acquired by appropriation may be transferred like other property by deed.' By the water code of 1917, Rem. Rev. Stat. Section 7391, 'the right to the use of water which has been applied to a beneficial use in the state shall be and remain appurtenant to the land or place upon which the same is used * * * ' * * * Hence, we conclude that we are not here dealing with *water as personal property,* but rather with an alleged *water right as real property.*"

The water rights to the extent of 4.84 acre feet on the Fox land, 5.56 acre feet on the Ottmuller land, and 6 acre feet on the Parks land became vested and as much a part of the soil as the houses, barns and other improvements placed thereon, or in the words of the Reclamation Act (43 USCA 372) *"shall be appurtenant to the land irrigated."*

In Ament vs. Bickford, 139 Wash. 494, the predecessor in title of Bickford had sold to predecessor in title of Ament a parcel of land and a perpetual water right, which required the purchaser to pay annually a certain sum for the use of the system. After many years

use, the successor in ownership of Bickford destroyed the water connection and shut off the supply. The court in commenting upon it said: "The appellant b o u g h t a *water right* which was intended to, and *did, become a part of the land.* * * * the contract did more than create covenants; *it transferred property.* * * * The *purchase was not of water from a water system, but of a certain definite water right.*"

To the same effect is the case of Dickinson vs. Dick, 151 Pac. 441, where an attorney had performed legal services for reservoir companies and accepted water rights in payment for his services. The companies became insolvent and a receiver was appointed who attempted to disregard the water right contracts on the theory that they were executory and burdensome upon the estate. The court in commenting upon it stated:

> "The contracts of plaintiff in error are not executory in their character, but the objects itself are fully performed prior to the appointment of the receiver. The corporation severally sold and received full compensation for perpetual water

rights, and delivered the same to the respective purchaser, thus investing the latter with dominion over the thing with which the former parted. Fletcher vs. Peck, 3 L. ed. 162."

"The making of the agreement, plaintiff and the construction company and its complete performance by the plaintiff, resulted in an executed contract transferring to plaintiff real property. 3 Kinney on Irrigation Sec. 1520, Consolidated Ditch Company vs. Old, 163 Pac. 78, Edinburg vs. Pachen, 235 S. W. 1088."

The reason why the Reclamation Act declares "that the right to the use of water acquired under the provisions of this act *shall be appurtenant to the land irrigated,* and beneficial use shall be the basis, the measure and the limit of the right" and the courts of Washington have consistently held that a water right is realty and appurtenant to the land, and the legislature and judicial decisions of the arid land states are to the same effect, is because the right to the use of water or water rights in the arid land states of the West is the foundation upon which all values of agricultural lands are based and consequently practically

all the values in cities and towns which have sprung up as a result of the reclamation of the arid lands by irrigation. Using the words of the Reclamtaion Act, "the right to the use of water acquired for irrigation is 'the basis' or foundation upon which rests all the development and all of the wealth which has transformed many sections of the arid West into happy and prosperous homes and farmsteads upon the land thus reclaimed, and cities and towns have sprung up and are dependent upon the protection of this right.

The farmer takes the land in its natural state, covered with sagebrush, with uneven surface and with depressions and draws through the same, which reqiures a vast amount of labor in removing the sagebrsuh and leveling the land so that water will flow over it in rills without leaving pools of water standing thereon. It is also necessary for him to construct ditches, flumes, pipe lines and other water conduits to carry the water to and distribute the same thereon for irrigation purposes, also a house, barn, outbuildings, fences and other improvements to make a complete farmstead. In most cases, the farmer does not have sufficient cap-

ital to make all these improvements and it is necessary for him, when his land is partly improved to place a mortgage thereon in order to get sufficient funds to complete the improvement. The loan is obtained from Federal Land Bank or Land Bank Commissioner, not upon the value of the land, which has no value without water, but upon the value of the water right which is a part of the land and which gives it value. The construction charges paid by the farmer for the construction of the artificial means to bring the water to the land, designated in Act as "construction charges," is but a small portion of the cost to respondents in making their land into complete farmsteads.

The reclamation law, which requires the construction charges to be "determined with a view of returning to the reclamation fund the estimated cost of construction" (43 USCA 461), which gives a lien in favor of the United States for all charges so fixed (43 USCA 542), and which requires the Secretary upon full payment of the construction charges to "issue upon request" a certificate certifying that payment of all building and betterment charges

in full has been made and the lien upon the land has been so far satisfied and is no longer of any force or effect (43 USCA 543), and that "no such right shall permanently attach until all payments therefor are made" (43 USCA 431) and "that when the payments required by this act are made for the major portion of the lands irrigated from the waters or works herein provided for, then the management and operation of such irrigation works shall pass to the owners of the lands irrigated thereby, to be maintained at their expense" (43 USCA 498), and that "whenever two-thirds of the irrigable area of any project, or division of a project shall be covered by water right contracts between the water users and the United States, said project shall be required to take over through a legally organized irrigation district, the care, operation, and maintenance of all of or any part of the project works," conclusively show that it was not the intention of Congress that the United States would acquire either the *water* or *water right* or the works of the project or that the United States would sell and respondents would purchase under executory contracts water to irrigate their lands, or

that the United States would continue to operate the irrigation system after it was a going concern and sufficient payment had been made on construction charges to protect the United States or after a contract had been entered into wih an irrigation district, comprising the division under the state law, which had agreed to pay the construction charges. It certainly would be very unusual for the United States to require a mortgage as security for all moneys advanced and then have title to the property acquired by such moneys after the mortgage was paid.

IV. VIOLATE THE FUNDAMENTAL DOCTRINE AND PROPERTY MAXIM OF WATER RIGHTS BY APPROPRIATION *"FIRST IN TIME, FIRST IN RIGHT"* WHICH THE SECRETARY OF INTERIOR IS REQUIRED TO OBSERVE IN CARRYING OUT THE PROVISIONS OF THE RECLAMATION LAW.

The basic public notice and order of October 17th, 1930, gives the reason for the promulgation and enforcement of this order and subsequent orders in the following language:

> "The *Kittitas division is now beginning the use of water to which it is en-*

> *titled under the contract between the Kittitas Reclamation District and the Unied States* and it has now become necessary to limit water deliveries in the Sunnyside Valley Irrigation District * * * notice is hereby given * * * that during the year 1931 and subsequent years, until further notice, water deliveries in that district will be limited to three acre feet per irrigable acre per year * * * provided, however, *so long as there is surplus stored water available and not required to meet the contract obligations* of the United States to other parties, water in excess of 3 acre feet may be rented by water users of the Sunnyside Valley Irrigation District * * *." (Fox 47, Ottmuller 44, Parks 37).

From the foregoing statement, it is evident that the purpose of the public notices and orders sought to be vacated was to take away the right to the use of water acquired to the extent of 1.84 acre feet from the Fox land, 2.56 acre feet from the Ottmuller land and 2.50 acre feet from the Parks land, where the same had been used for more than twenty years and to give those rights to lands in the Kittitas Reclamation District. This is in positive violation of the

express terms of the reclamation law which provides:

> "Whenever in carrying out the provisions of the reclamation law, storage or carrying capacity has been or may be provided *in excess of the requirements of the lands to be irrigated under any project,* the Secretary of the Interior, *preserving a first right* to lands and entrymen under the project, is hereby authorized, * * * to contract for the impounding, storage, and carriage of water *to an extent not exceeding such excess capacity* with irrigating systems operating under Section 14 of this title * * * and Irrigation Districts" (43 USCA 523).

This section expressly commands the Secretary in carrying out the provisions of the reclamation law, to recognize and follow the fundamental and elementary rule which gives stability to property rights and which has been uniformly recognized by custom, legislation and judicial decisions of the arid land states since the initiation of the right to the use of water by appropriation until the present time; and is in harmony with the express terms of

Section 3 of the contract between the Sunnyside Water Users' Association and Secretary of May 7, 1906, which provides that the total acreage for which rights to the use of water shall be issued *"shall, in no event"* exceed the amount of water available from all sources, measured by beneficial use.

Section 4 and Section 11 of Act approved November 13th, 1873 (Session Laws 1873, page 520); also act approved March 9th, 1891, Sec. 1 (Session Laws 1891, Chapter 142) and the water code approved March 14th, 1917 (Session Laws 1917, Chapter 117, Sec. 1) expressly declare the law that "as between appropriations, the *first in time shall be the first in right.*"

In the case of Longmire vs. Smith, 26 Wash. 439 (1901) suit was b r o u g h t by Longmire against Smith to quiet title to water appropriated by him for the irrigation of farm lands, and the issue involved was whether he was entitled to water for the irrigation of the entire tract as of the date of the original appropriation upon which issue the court held in his favor and stated:

"It is an elementary principal of the

law of appropriation of water for irrigation that the *first appropriator is entitled to the quantity of water appropriated by him, to the exclusion of subsequent claimants by appropriation* or riparian ownership. When a valid appropriation is made, the right, according to all the authorities, becomes vested."

This doctrine was first recognized and declared in the case of Irwin vs. Phillips, 5 Cal. 140 (1855). The court stated:

"There are still some which a universal sense of necessity and propriety have so firmly fixed as that they have come to be looked upon as having the force and effect of res judicata. Among these the most important are the rights of miners to be protected in the possession of their selected localities, and *the rights of those who, by prior appropriation, have taken the waters from the natural beds, and by costly artificial works have conducted them for miles over mountains and ravines, to supply the necessities of gold diggers,* and without which the most important interests of the mineral region would remain without development * * * it has equally conferred *the right*

> *to divert the streams from their natural channels,* and as these two rights stand upon an equal footing when they conflict, *they must be decided by the fact of priority.*"

In Willey vs. Decker, 11 Wyo. 1146, 73 Pac. 210 (1903) the issues involved were water rights based upon appropritaion, the court stated:

> "It will be observed that the doctrine of prior appropriation is established as a rule of imperative necessity, and the outgrowth of the custom of the earlier settlers upon the public lands for the purpose of mining and rendering the soil available for cultivation. The doctrine was first recognized by Congress in 1866 by Act of July 6th of that year."

Public notices and orders sought to be vacated override the provisions in the reclamation law which makes beneficial use the measure; that forbids increase in construction charges; that makes the water right appurtenant to the land and provides "first in time, first in right," thereby depriving the respondents of property rights in violation of the Federal Constitution, State Constitution, legisla-

tion and judicial decisions of the State of Washington, and contracts and water right applications, under which respondents have *"the right to the use of water acquired under the provisions of the reclamation law."*

THE ACTION OF THE TRIAL AND APPELLATE COURT IN DENYING PETITIONER'S MOTION TO DISMISS CONSTITUTES A PROPER EXERCISE OF JURISDICTION AND JUDICIAL FUNCTION.

The cases of Wells vs. Roper, Transcontinental and Western Air vs. Farley; Boeing Air Transport vs. Farley and United States ex rel Shoshone Irrigtaion District vs. Ickes, cited and strongly relied upon by the petitioner are clearly distinguishable from these suits for the reasons, first, in those suits the plaintiff sought to control the discretion and judgment of the executive officer on matters entrusted to him by Congress, second, involved the breach of a contract by the United States. Congress had entrusted the matters involved to the discretion of the Postmaser General in the first three cases and Secretary of the Interior in the last case and the executive official was acting with-

in the statutory authority and jurisdiction so entrusted to him in discretionary matters and because of that fact the courts had no jurisdiction to interfere.

Neither of these elements exist in these suits. The difference between the illegal seizure of the property and cancellation of a contract is clearly pointed out in Goltra vs. Weeks, 271 U. S. 536, in which case the court stated:

> "The difference between an injunction against the illegal seizure of property lawfully possessed and against the cancellation of a contract, which involved no change of possession, is manifest."
>
> "The bill was suitably framed to secure the relief from an alleged conspiracy of the defendants without lawful right to take away from the plaintiffs the boats of which by lease or charter, he alleged that he had acquired the lawful possession and enjoyment for a definite period of five years. He was seeking equitable relief to avoid a threatened trespass upon that property by persons who were government officers. If it was a trespass, then the officers of the government should be restrained, whether

> they profess to be acting for the Government or not. Neither they nor the Government they represent could trespass upon the property of another, and it is well settled that they may be stayed in their unlawful proceedings by a court of competent jurisdiction, even though the United States for whom they may profess to act is not a party and cannot be made one. *By reason of their illegality, their acts or threatened acts are personal and derive no official justification from their doing them in asserted agency for the government.*"

In Ballinger vs. United States, 216 U. S. 240, 54 L. ed. 464, which was a suit for mandamus to compel the Secretary of Interior to cause to be delivered, a patent to an Indian Allottee, in accordance with law, the court stated:

> "Whenever, in pursuance of the legislation of Congress, rights have become vested, it becomes the duty of the courts to see that those rights are not disturbed by any action of an executive officer, even the Secretary of the Interior, the head of a department. However laudable may be the motives of the Secretary, *he,*

as all others, is bound by the provisions of congressional legislation."

In the case of Miguel vs. McCarl, 261 U. S. 442, 78 L. ed. 901, suit was brought against the Comptroller General to enjoin him from interfering with the payment to petitioner, of retired pay and allowances, and the court stated:

> "Mandatory injunction prayed for is in effect equivalent to a writ of mandamus and governed by like considerations. In this situtaion the duty of the disbursing official to pay the voucher in question is so plainly prescribed as to be free from doubt and equivalent to a positive command, and therefore, is so far ministerial that its performance may be compelled by mandamus."

In American School of Magnetic Healing vs. McAnnulty, 187 U. S. 94, 47 L. ed. 90, the Postmaster at Nevada, Missouri, pursuant to order from the Postmaster General, refused to deliver to the plaintiff, mail to which it was entitled. Suit was brought for an injunction to prevent the enforcement of the orders. The court in commenting upon the order under which the Postmaster was acting, said:

> "His right to exclude the letters, or to

> refuse to permit their delivery to persons addressed, must depend upon some law of Congress, and if no such law exists, then he cannot exclude or refuse to deliver them. * * * Otherwise, the individual is left to the absolutely untrolled and arbitrary action of a public and administrative officer, whose action is unauthorized by any law, and, in violation of the rights of the individual. Where the action of such an officer is thus unauthorized, he thereby violates the property rights of the person whose letters are withheld."

In Payne vs. Central Pacific Railway, 255 U. S. 228, 65 L. ed. 598, suit was brought to enjoin the Secretary of Interior and Commissioner of the General Land Office, from cancelling a selection of indemnity lands under a railroad land grant. The court stated:

> "We are asked to say that this is a suit against the United States, and therefore not maintainable without its consent; but we think the suit is one to restrain the appellants from cancelling a valid indemnity selection through a mistaken conception of their authority, and thereby casting a cloud upon the plaintiff's

title. Philadelphia Company vs. Stimson, 223 U. S. 605, 619, 20, 56 L. ed. 570, 576, 577; Lane vs. Watts, 234 U. S. 525, 540, 58 L. ed. 1440, 1456."

In the case of Garfield vs. Goldsby, 211 U. S. 249, action was brought for the writ of mandamus against the Secretary of the Interior in his official capacity to require him to erase certain marks and notations theretofore made by his predecessor in office upon the rolls, striking therefrom the name of the relator, Goldsby, as an approved member of the Chickisaw Nation and to restore her to enrollment as a member of the Nation. The court granted the mandatory injunction and stated:

"The right to be heard before property is taken, or rights or privileges withdrawn, which have been previosuly legally awarded is of the essence of due process of law. It is unnecessary to recite the decisions in which the principle has been repeatedly recognized. It is enough to say that its binding obligation has never been questioned in this court * * *. There is *nothing in the statutes as we read them, which gave the Secretary power and authority without notice*

and hearing, to strike down the rights thus acquired."

The last expression of this court upon this question was Ickes vs. Virginia Colorado Development Company, 295 U. S. 639, which was a suit "to obtain a mandatory injunction against the Secretary of the Interior to require him to vacate certain adverse proceedings and his decision declaring certain placer claims of the plaintiff to be void," the court stated: "The Department's challenge, its adverse proceedings, and the decision set forth in the bill went beyond the authority conferred by law" and sustained the decree of lower courts where the identical question involved in these suits was before the court.

Using the language and thought of the court in United States vs. Lee, 106 U. S. 197, 27 L. ed. 171, 182, the respondents respectfully ask, "Shall it be said, in the face of all this, and the acknowledged right of the judiciary to decide in proper cases, statutes which have been passed by both branches of Congress and approved by the President, to be unconstitutional, that the courts cannot give a remedy when the respondents have been deprived of their *'right*

to the use of water acquired under the reclamation act" pursuant to the constitution, legislation and judicial decisions of the State of Washington, their rights 'seized and converted to the use of the Government' for *'the Kittitas division which is now beginning the use of water to which it is entitled under the contract between the Kittitas Reclamation District and the United States'* (Parks 37) 'without any lawful authority, without any process of law and without compensation,' (without any hearing and without heeding a joint memorial of the Legislature of the State of Washington. Fox 40), because the Secretary of the Interior has issued public notices and orders denying them these rights, which are guaranteed to them by the Constitution of the United States?"

The abritrary and capricious action in the promulgation of the notices and orders to force and coerce the payment by respondents and other water users of $1,000,000.00 of the cost of construction of the Cle Elum reservoir for new divisions with an agreement between the executives in charge of the administration of the reclamation law and the officials of the districts comprising the new divisions that in

the event payment could not be enforced, then the new divisions would pay the same, reached the climax when the petitioner refused to grant respondents and other water users a hearing and ignored a joint memorial of the legislature of the State of Washington (Fox 41), and is conclusive proof that the petitioner is not exercising good faith or an honest judgment. The nearest approach to a similar situation was presented to this court in Sterling vs. Constantine, 287 U. S. 378, where the Governor of Texas took a similar position, and asserted as the petitioner asserts in these cases, that the court is powerless to grant relief, but this court held that the Constitution of the United States and not the edict of the Governor was the Supreme Law of the Land.

CONCLUSION

For the reasons which have been set forth in the foregoing, it is respectfully submitted that the judgments below are correct and should be affirmed.

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December 21st, 1936

APPENDIX

TITLE 43, UNITED STATES CODE ANNOTATED

SEC. 371. *Definitions: "Secretary," "reclamation law," "reclamation fund," "project,"* and *"division of a project."* When used in this chapter—

(a) The word "Secretary" means the Secretary of the Interior.

(b) The words "reclamation law" mean the provisions of this chapter.

(c) The words "reclamation fund" mean the fund provided by the reclamation law.

(d) The word "project" means a Federal irrigation project authorized by the reclamation law.

(e) The words "division of a project" mean a substantial irrigable area of a project designated as a division by order of the Secretary. (Dec. 5, 1924, c. 4, Sec. 4, subsec. A, 43 Stat. 701; Feb. 21, 1925, c. 277, Sec. 1, 43 Stat. 956.)

SEC. 372. *Water right as appurtenant to land and extent of right.* The right to the use of water acquired under the provisions of the reclamation law shall be appurtenant to the land ir-

rigated, and beneficial use shall be the basis, the measure, and the limit of the right. (June 17, 1902, c. 1093, Sec. 8, 32 Stat. 390.)

SEC. 412. *Prerequisites to initiaion of project or division of project.* After December 5, 1924, no new project or new division of a project shall be approved for construction or estimates submitted therefor by the Secretary until information in detail shall be secured by him concerning the water supply, the engineering features, the cost of construction, land prices, and the probable cost of development, and he shall have made a finding in writing that it is feasible, that it is adaptable for actual settlement and farm homes, and that it will probably return the cost thereof to the United States. (Dec. 5, 1924, c. 4, Sec. 4, subsec. B, 43 Stat. 702.)

SEC. 413. *Approval of project by President.* No irrigation project shall be begun unless and until the same shall have been recommended by the Secretary of the Interior and approved by the direct order of the President of the United States. (June 25, 1910, c. 407, Sec. 4, 36 Stat. 836.)

SEC. 419. *Contract for irrigation project; notice as to lands irrigable, unit of entry, and construction charges.* Upon the determination that any irrigation project is practicable, the Secretary of the Interior may cause to be let contracts for the construction of the same, in such portions or sections as it may be practicable to construct and complete as parts of the whole project, providing the necessary funds for such portions or sections are available, and thereupon he shall give public notice of the lands irrigable under such project, and limit of area per entry, which limit shall represent the acreage which, in the opinion of the Secretary, may be reasonably required for the support of a family upon the lands in question; also of the charges which shall be made upon the said entries, and upon lands in private ownership which may be irrigated by the waters of the said irirgation project, and the number of annual installments in which such charges shall be paid and the time when such payments shall commence: Provided, That in all construction work eight hours shall constitute a day's work, and no Mongolian labor shall be

employed thereon. (June 17, 1902, c. 1093, Sec. 4, 32 Stat. 389.)

SEC. 461. *Determination of construction charges generally.* The construction charges which shall be made per acre upon the entries and upon lands in private ownership which may be irrigated by the waters of any irrigation project shall be determined with a view of returning to the reclamation fund the estimated cost of construction of the project, and shall be apportioned equitably. (June 17, 1902, c. 1093, Sec. 4, 32 Stat. 389.)

SEC. 469. *Increase in construction charges.* No increase in the construction charges shall, after August 13, 1914, be made, after the same have been fixed by public notice, except by agreement between The Secretary of the Interior and a majority of the water-right applicants and entrymen to be affected by such increase, whereupon all water-right applicants and entrymen in the area proposed to be affected by the increased charge shall become subject thereto. Such increased charge shall be added to the construction charge and payment thereof distributed over the remaining unpaid

installments of construction charges: Provided, That the Secretary of the Interior, in his discretion, may agree that such increased construction charge shall be paid in additional annual installments, each of which shall be at least equal to the amount of the largest installment as fixed for the project by the public notice theretofore issued. And such additional installments of the increased construction charge, as so agreed upon, shall become due and payable on December 1 of each year subsequent to the year when the final installment of the construction charge under such public notice is due and payable: Provided further, That all such increased construction charges shall be subject to the same conditions, penalties, and suit or action as provided in sections 478, 480, and 481 of this chapter. (August 13th, 1914, c. 247, Sec. 4, 38 Stat. 687.)

SEC. 500. *Duty of association or district to take over management.* Whenever two-thirds of the irrigable area of any project, or division of a project, shall be covered by water-right contracts between the water users and the United States, said project shall be required, as a

condition precedent to receiving the benefits of this chapter, to take over, through a legally organized water-users' association or irrigation district, the care, operation, and maintenance of all or any part of the project works, subject to such rules and regulations as the Secretary may prescribe, and thereafter the United States, in its relation to said project, shall deal with a water-users' association or irrigation district, and when the water-users assume control of a project, the operation and maintenance charges for the year then current shall be covered into the construction account to be repaid as part of the construction repayments. (Dec. 5, 1924, c. 4, Sec. 4, subsec. G, 43 Stat. 702.)

SEC. 511. *Authority to contract with irrigation district.* In carrying out the purposes of the reclamation law, the Secretary of the Interior may enter into contract with any legally organized irrigation district whereby such irrigation district shall agree to pay the moneys required to be paid to the United States, and in such event water-right applications on the part of the landowners and entrymen, in the

discretion of the Secretary of the Interior, may be dispensed with. In the event of such contract being made with an irrigation district, the Secretary of the Interior, in his discretion, may contract that the payments, both for the construction of irrigation works and for operation and maintenance, on the part of the district shall be made upon such dates as will best conform to the district and taxation laws of the respective States under which such irrigation districts shall be formed, and if he deem it advisable he may contract for such penalties or interest charges in case of delinquency in payments as he may deem proper and consistent with such State laws, notwithstanding the provisions of sections 471, 475, 478, 492 and 497 of this chapter. The Secretary of the Interior may accept a partial payment of the amount due from any district to the United States, providing such acceptance shall not constitute a waiver of the balance remaining due nor the interest or penalties, if any, accruing upon said balance: Provided, That no contract with an irrigation district under this and the two following sections shall be binding on the United States until the proceedings on the part of the

district for the authorization of the execution of he contract with the United States shall have been confirmed by decree of a court of competent jurisdiction, or pending appellate action if ground for appeal be laid. (May 15, 1922, c. 190, Sec. 1, 42 Stat. 541.)

SEC. 512. *Release of Government liens after contract with irrigation districts.* Patents and water-right certificates which shall be issued after May 15, 1922, under the terms of sections 541 to 546, inclusive, of this chapter, for lands lying within any irrigation district with which the United States shall have contracted, by which the irrigation district agrees to make the payment of all charges for the building of irrigation works and for operation and maintenance, shall not reserve to the United States a lien for the payment of such charges; and where such a lien shall have been reserved in any patent or water-right certificate issued under the said sections, the Secretary of the Interior is hereby empowered to release such lien in such manner and form as may be deemed effective; and the Secretary of the Interior is further empowered to release liens in favor

of the United States contained in water-right applications and to assent to the release of liens to secure reimbursement of moneys due to the United States pursuant to water-right applications running in favor of the water-users' association and contained in stock subscription contracts to such associations when the lands covered by such liens shall be subject to assessment and levy for the collection of all moneys due and to become due to the United States by irrigation districts formed pursuant to State law and with which the United States shall have entered into contract therefor: Provided, That no such lien so reserved to the United States in any patent or water-right certificate shall be released unil the owner of the land covered by the lien shall consent in writing to the assessment levy and collection by such irrigtaion district of taxes against said land for the payment to the United States of the contract obligation: Provided further, That before any lien is released under this section the Secretary of the Interior shall file a written report finding that the contracting irrigation district is legally organized under the laws of the State in which its lands are located, with full power

to enter into the contract and to collect by assessment and levy against the lands of the district the amount of the contract obligation. (May 15, 1922, c. 190, Sec. 2, 42 Stat. 542.)

SEC. 542. *Reservation of lien for charges; enforcement of lien; redemption.* Every patent and water-right certificate issued under the preceding section shall expressly reserve to the United States a prior lien on the land patented or for which water-right is certified, together with all water-rights appurtenant or belonging thereto, superior to all other liens, claims or demands whatsoever for the payment of all sums due or to become due to the United States or its successors in control of the irrigation project in connection with such lands and water-rights.

Upon default of payment of any amount so due title to the land shall pass to the United States free of all encumbrance, subject to the right of the defaulting debtor or any mortgagee, lien holder, judgment debtor, or subsequent purchaser to redeem the land within one year after the notice of such default shall have been given by payment of all moneys due, with

8 per centum interest and cost. And the United States, at its option, acting through the Secretary of the Interior, may cause land to be sold at any time after such failure to redeem, and from the proceeds of the sale there shall be paid into the reclamation fund all moneys due, with interest as herein provided, and costs. The balance of the proceeds, if any, shall be the property of the defaulting debtor or his assignee: Provided, That in case of sale after failure to redeem under this section the United States shall be authorized to bid in such land at not more than the amount in default, including interest and costs. (Aug. 9, 1912, c. 278, Sec. 2, 37 Stat. 266.)

SEC. 543. *Certificate of final payment and release of lien.* Upon full and final payment being made of all amounts due on account of the building and betterment charges to the United States or its successors in control of the project, the United States or its successors, as the case may be, shall issue upon request a certificate certifying that payment of the building and betterment charges in full has been made and that the lien upon the land has been so far satisfied and is no longer of any force

or effect except the lien for annual charges for operation and maintennace. (Aug. 9, 1912, c. 278, Sec. 3, 37 Stat. 266.)

In the Supreme Court of the United States

OCTOBER TERM, 1936

No. 266

HAROLD L. ICKES, SECRETARY OF THE INTERIOR, PETITIONER

v.

MAZINE Z. FOX ET AL.

No. 267

HAROLD L. ICKES, SECRETARY OF THE INTERIOR, PETITIONER

v.

PHILLIP LOUIS PARKS ET AL.

No. 268

HAROLD L. ICKES, SECRETARY OF THE INTERIOR, PETITIONER

v.

JACOB F. OTTMULLER

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

PETITION FOR REHEARING

Comes now the Solicitor General, on behalf of the petitioner, and respectfully prays that the judg-

ments heretofore entered in the above-entitled causes be vacated, that the issuance of the mandates thereon be stayed, and that a rehearing be granted.

The petitioner respectfully asks reconsideration of these cases. (1) The decision of this Court must inevitably lead to serious consequences in the administration of the Reclamation Fund. (2) The opinion establishes a novel rule of water rights which is directly contrary to the admittedly applicable law of Washington. (3) No compensatory advantage in the administrative law relating to Reclamation projects is gained by substituting an injunction suit for an action on the contract.

First. The consequences of the decision with respect to the administration of the Reclamation Fund established by Congress are best brought out by examination of the *Ottmuller* case, No. 268.

Ottmuller's contract was for three acre-feet per annum per acre, or so much thereof as shall constitute the proportionate share per acre from the water supply actually available for the lands under the project (Opinion, p. 3, n. 1). The Court holds that Ottmuller, who alleged no source of his water right save under his contract and delivery by the Secretary, has a vested water right through user for 5.56 acre-feet of water per annum because the Secretary in fact delivered the larger amount. The basis of Ottmuller's right cannot be direct diversion from the natural flow of the stream, for Ottmuller never made any such diversion. It cannot be con-

tract, for Ottmuller's contract plainly entitled him to no more than a maximum of three acre-feet. If, then, the opinion of the Court is to stand, it must follow that there has been established a new source of water rights, namely, continuous receipt of water over and beyond any original legal obligation. In substance, this amounts to a nonadverse prescription enforceable against a gratuitous benefactor. No decision before the present one has recognized any such principle; no trace of any such doctrine can be found in the Washington statutes or decisions, which admittedly control these cases.

The administrative consequences of such a rule are serious. Most projects require a very long period before final completion. Thus, the lands for which water is first made available have a supply of water considerably in excess of that which they are entitled to receive upon completion of the water system. Moreover, as has long been recognized in arid regions, more water is needed during the first years of irrigation than is subsequently required. *Federal Reclamation by Irrigation,* Sen. Doc. 92, 68th Cong., 1st Sess., p. 78; Widtsoe, *Principles of Irrigation Practice* (1926), pp. 334–335; 344–345. Consequently, the practice of the Secretary has been to allow the lands for which water was first made available to receive excess water pending completion of the project. In many cases, as in these, he will now be met by a claim that this gratuity has ripened into an inviolable property right. The necessary effect must be

that the Secretary of the Interior is either unable to deliver the water to the other lands or must incur substantially increased costs in order to do so. In either event, the result must be to deplete the irrigation fund, which was intended to be self-sustaining. See *Swigart* v. *Baker*, 229 U. S. 187.

Second. The opinion of the Court disregards entirely the applicable Washington law, which admittedly governs here.[1] Section 8 of the Reclamation Act, c. 1093, 32 Stat. 390; see *Power Co.* v. *Cement Co.*, 295 U. S. 142, 164–165. The Supreme Court of Washington fully recognizes the distinction between a water right based upon actual, direct diversion from the natural flow of a stream, and a water right based upon a contract with one who has himself made such diversion and has stored the diverted water in an artificial reservoir. In cases involving the second type of water right, that court has repeatedly indicated that the contract must be looked to for a determination of the extent of the right. *Lanham* v. *Wenatchee Canal Co.*, 48 Wash. 337, 338; *Shafford* v. *White Bluffs Co.*, 63 Wash. 10, 17; *Madison* v. *McNeal*, 171 Wash.

[1] So far as the opinion of the Court relies on Section 8 of the Reclamation Act, making the water *right* "appurtenant to the land irrigated" and "beneficial use * * * the basis, the measure, and the limit of the right", it is plain from the legislative history that this provision was not intended to convey a property right in the water but was designed to prevent speculative acquisition of the rights for sale elsewhere. See H. Rep. No. 1468, 57th Cong., 1st Sess., p. 7; 35 Cong. Rec. 1385, 6679.

669, 680; *Wenatchee Recl. Dist.* v. *Titchenal*, 175 Wash. 398, 403–404. Not only does the Washington court recognize this distinction, but it holds in the case where water is delivered to the landowner from a reservoir that the owner of the reservoir is the owner of the water stored therein.[2] *Dunsmuir* v. *Port Angeles Gas Co.*, 24 Wash. 104, 114; *Methow Cattle Co.* v. *Williams*, 64 Wash. 457, 460; *Madison* v. *McNeal, supra*, 674. It is for this reason that petitioner contends that the United States, owner of the reservoir, and owner of the water which must be delivered to respondents pursuant to the terms of their water contracts and applications, is an indispensable party to any proceeding involving a determination of the quantum of such water rights. The decision of this Court to the contrary cannot but prove disturbing in an important field of law which had been thought to be settled.

Petitioner does not contend that the Government owns the water *rights*. The pleadings amply show that petitioner concedes respondents' ownership of the contractual water rights. But petitioner

[2] Most arid land States concur in this view. *Wrathall* v. *Johnson*, 86 Utah 50, 76–77; *Washington County Irr. Dist.* v. *Talboy*, 55 Idaho 382, 389–390; *Vaughan* v. *Kalb*, 130 Ore. 506, 511–516; *Hagerman Irr. Co.* v. *McMurry*, 16 N. M. 172, 180–181; *Ball* v. *Kehl*, 95 Cal. 606, 613. Colorado appears to be the sole exception. In that State the reservoir owner and immediate diverter is limited to the rights of a mere carrier. *Pioneer Irrigation Co.* v. *Board of Commissioners*, 236 Fed. 790, 792 (D. Colo.).

does maintain that the United States owns the *water* which is necessary to satisfy respondents' water rights, and therefore insists that the United States is an indispensable party to any controversy, the result of which, as here, necessarily involves a delivery of its own property to satisfy adverse claims asserted by others.

It is, moreover, to be noted that the Washington law specifically recognizes the United States as a diverter and as an appropriator from the natural flow of the Yakima River for the very project involved in the instant case. 8 Remington's Rev. Stat., Sec. 7408 *et seq.* And the appropriation of the United States made pursuant to this statute was not affected by the Washington Act of 1917, Laws 1917, c. 117, Sec. 39, relied on in the opinion of the Court to establish ownership of the water in the landowners, since the 1917 statute (c. 117, Sec. 1) in terms declares that—

> Nothing contained in this act shall be construed to lessen, enlarge, or modify the existing rights of any riparian owner, or any existing right acquired by appropriation, or otherwise.

Third. To sustain petitioner's position that an injunction may not issue against him to enforce a contract of the United States would not leave respondents helpless against any administrative abuse. The Court of Claims is open to them, *North Platte C. & C. Co.* v. *United States*, 48 C. Cls. 281, as are the District Courts under the Tucker

Act. If respondents' contentions were sustained in a suit for damages, it must, of course, be assumed that petitioner and his successors would thereafter make water deliveries in conformance with the decision. See *Ex parte Grossman*, 267 U. S. 87, 121.

Wherefore your petitioners respectfully pray that this petition be granted, the mandates be stayed, and the decrees of the court below be reversed.

Copies of this petition will be served upon opposing counsel.

STANLEY REED,
Solicitor General.

I certify that this petition is presented in good faith and not for delay.

STANLEY REED,
Solicitor General.

FEBRUARY 1937.

U. S. GOVERNMENT PRINTING OFFICE: 1937

SUPREME COURT OF THE UNITED STATES.

Nos. 266, 267 and 268.—October Term, 1936.

266	Harold L. Ickes, Secretary of the Interior, Petitioner, *vs.* Mazine Z. Fox, et al.	On Writs of Certiorari to the United States Court of Appeals for the District of Columbia.
267	Harold L. Ickes, Secretary of the Interior, Petitioner, *vs.* Phillip Louis Parks, et al.	
268	Harold L. Ickes, Secretary of the Interior, Petitioner, *vs.* Jacob F. Ottmuller.	

[February 1, 1937.]

Mr. Justice Sutherland delivered the opinion of the Court.

The sole question in each of these three cases is whether the United States is an indispensable party defendant. The suits were brought in the Supreme Court of the District of Columbia. That court, on motion of petitioner, deeming the presence of the United States to be indispensable, dismissed the bills as amended. Thereupon, by permission of the court, second-amended bills were filed. Petitioner renewed his motions to dismiss, which the court then denied. A special appeal was allowed by the court below, and resulted in an affirmance of the decree of the trial court. 85 F. (2d) 294. The allegations of the three second-amended bills of complaint differ in some particulars; but whether these differences will (so) affect the final disposition of the suits as to require unlike decrees, we do not determine. They are not such as to necessitate diverse rulings in respect of the question which now is presented for decision. In this view, we confine our statement, except as otherwise noted, to the allegations of the bill of complaint in the Fox case, No. 266.

the extent or measure of the rights of the respective respondents or

Petitioner, as Secretary of the Interior, has charge of the administration of the Reclamation Act of June 17, 1902 (32 Stat. 388), as amended. In 1906, the then Secretary of the Interior approved a reclamation project known as the "Sunnyside Unit of the Yakima Project"; and purchased from the Washington Irrigation Company the Sunnyside Canal, together with the water appropriations and irrigation system connected therewith. At the time of the purchase, certain arid and unirrigated lands, described in the bill, thereafter and now owned by respondents, were within the unit embraced by the project.

The then owners of the lands, predecessors of respondents in title, and other owners of similar lands, incorporated the Sunnyside Water Users Association under the laws of the State of Washington, put their lands within the reclamation project, and agreed to take water from the project to irrigate such lands.

The association, on May 7, 1906, entered into a contract with the United States, the recitals of which in substance, so far as pertinent, are that these lands are desert and arid in character and will remain so unless the waters of the Yakima River and its tributaries be impounded and the flow regulated and controlled; that the Secretary contemplates the construction of irrigation works under the Reclamation Act for the irrigation and reclamation of these lands; that the incorporators and shareholders of the association are required to be owners and occupants of lands within the area to be irrigated, and already are in some cases appropriators of water for the irrigation thereof; that they are required to initiate rights to the use of water from the proposed irrigation works as soon as may be, and complete the acquisition thereof as prescribed by the Secretary, "which rights shall be, and thereafter continue to be, forever appurtenant to designated lands owned by such shareholders."

Following these recitals, it was agreed that only those who became members of the association should be accepted as applicants for rights to the use of water; that the aggregate amount of such rights should not exceed the number of acres of land capable of irrigation by the total quantity of water available—namely, the quantity now appropriated by shareholders of the association and the quantity to be delivered from all sources in excess of the water now appropriated; that the Secretary should determine the number of acres

capable of such irrigation, "to be based upon and measured and limited by the beneficial use of water"; that water rights should be paid for in ten annual installments; that the association guarantees payment for that part of the cost of the irrigation works apportioned to its shareholders—times and methods of payment being stipulated in detail; that rights to water where the same have vested were to be defined, determined, and enjoyed in accordance with the Reclamation Act and other acts of Congress on the subject of the acquisition and enjoyment of such rights, and by the laws of the State of Washington.

Some time after the execution of the foregoing contract, the predecessors in title of respondents, upon officially-approved forms, made applications for water-rights for the irrigation of the lands here involved. By the terms of the applications, the measure of the water-right for the land was stated to be that quantity which shall be beneficially used for the irrigation thereof, not exceeding the share proportionate to irrigable acreage of the water supply actually available, to be paid for [in ten annual instalments] in an amount which was fixed in each application.[1] The applicants agreed that the construction charge and the annual charges for operation and maintenance should be and were made a lien upon the lands and all water-rights then or thereafter appurtenant or belonging thereto, together with all improvements thereon.

It further is alleged that a former Secretary of the Interior determined that the total cost of the water rights for all the lands in the unit would be $52 per acre, and that such sum would be sufficient to return to the reclamation fund the total cost of the project; that, pursuant to the terms of the Reclamation Act, he fixed the construction charge for the land here involved at that amount per acre, and issued public notice and order accordingly; that thereafter the successive Secretaries of the Interior uniformly construed the Reclamation Act and the contractual obligations, to the effect that the owners of the lands had purchased a sufficient quantity of water to beneficially and successfully irrigate their lands, to be determined by representatives of the Secretary having

[1] In the Parks case the quantity of water applied for was stated to be three acre-feet of water per annum per acre, or as much more as will be required to successfully irrigate the land. In the Ottmuller case the quantity was stated to be three acre-feet of water per annum per acre, or so much thereof as shall constitute the proportionate share per acre from the water supply actually available for the lands under the project.

physical charge of the water distribution, from a factual investigation and personal examination of the lands and the crops growing thereon and the water requirements thereof.

Pursuant thereto, it was determined by representatives of the successive Secretaries that 4.84 acre-feet of water per annum per acre was necessary to beneficially and successfully irrigate respondents' lands; that, thereupon, the Secretaries of the Interior, through their representatives, have, for a period of more than twenty years, delivered to such lands the necessary quantity of water; that after the construction of the irrigation system and reservoirs of sufficient capacity to beneficially and successfully irrigate all lands within the unit, an act of Congress was passed providing that no increase of construction charges could be made after they had been fixed by public notice and order, except by agreement between the secretary and a majority of the water-right applicants. On September 24th, 1914, the then Secretary of the Interior issued a public notice and order, declaring that there would be no increase in the construction charges against the lands.

Respondents and their predecessors, it is alleged, have fully complied with the terms of the Reclamation Act and all obligations in connection with their water-rights, and have paid to the government all sums due on account of construction charges, and all operation and maintenance charges, and have acquired vested water-rights sufficient to beneficially and successfully irrigate their lands—namely, 4.84 acre-feet of water per acre per annum; and that such water-rights are appurtenant to their lands.

The bill further alleges that in 1930 the Commissioner of Reclamation desired to construct the Cle Elum Reservoir to store water for the irrigation of lands in the Kittitas Reclamation District and other lands, the canal and distributing system in that district being then in process of construction. But finding that the cost of the reservoir would exceed, by $1,000,000, the amount which would be returned to the reclamation fund, and without consulting respondents or other water users in the Sunnyside Unit of the Yakima Project, the commissioner charged the sum of $1,000,000 to that unit and district, and informed the secretary to that effect. Neither respondent nor any other water users in that unit or district ever agreed to this arrangement; but the then-secretary certified to the President that provision had been made for the repayment to the

reclamation fund of the total cost of the reservoir, and that $1,000,000 thereof was to be obtained by rentals from the Sunnyside Division of the Yakima Project.

The bill further alleges that the secretary and other officials agreed with designated persons to attempt to force and coerce respondents, and other water users in the district, to induce the district to agree to pay the additional sum; otherwise, to force and coerce them to sign water-rental applications or be deprived of a portion of the water owned by them. In pursuance thereof, public notice was given and an order issued limiting their rights to three acre-feet per acre, and exacting a specified rental charge for additional water. Respondents and the other water users were notified that they would be deprived of all water in excess of the three acre-feet per acre unless they made application for additional water in a form and manner prescribed. Respondents and the other water-right users, however, refused to make such applications.

It is further alleged that three acre-feet of water per acre is not, never has been, and will not in the future be sufficient to beneficially irrigate respondents' lands; but would leave a large part thereof barren and nonproductive, thereby forcing about half of their lands to bear construction, maintenance charges, taxes and assessments upon the whole thereof. The bill shows that irreparable loss and damage will result if the order of the secretary is enforced; and that respondents have no adequate or complete remedy at law, but that effective relief can be administered only by a court of equity. The prayer is for a decree requiring the secretary to vacate, set aside and hold for naught the notices and orders set forth in and attached to the bill, and that respondents be restored to their former rights and privileges.

The bill goes into greater detail in respect of the facts; but the foregoing general statement of the allegations is enough for present purposes. Succinctly stated, the case comes to this: The United States, under the Reclamation Act, constructed an irrigation system for the purpose of storing and distributing water for irrigation of arid lands. Respondents own water-rights under the system for lands of that kind; and these lands require artificial irrigation to render them productive. So far as these respondents are concerned, the government did not become the owner of the water-rights, because those rights by act of Congress were made "ap-

purtenant to the land irrigated";[2] and by a Washington statute, in force at least since 1917, were "to be and remain appurtenant to the land".[3] Moreover, by the contract with the government, it was the land owners who were "to *initiate* rights to the use of water", which rights were to be and "continue to be forever appurtenant to designated lands owned by such shareholders."

Respondents had made all stipulated payments and complied with all obligations by which they were bound to the government, and, long prior to the issue of the notices and orders here assailed, had acquired a vested right to the perpetual use of the waters as appurtenant to their lands. Under the Reclamation Act, *supra*, as well as under the law of Washington, "beneficial use" was "the basis, the measure and the limit of the right." And by the express terms of the contract made between the government and the Water Users Association in behalf of respondents and other shareholders, the determination of the secretary as to the number of acres capable of irrigation was "to be based upon and measured and limited by the beneficial use of water." Predecessors of petitioner, accordingly, had decided that 4.84 acre-feet of water per annum per acre was necessary to the beneficial and successful irrigation of respondents' lands; and upon that decision, for a period of more than twenty years prior to the wrongs complained of, there was delivered to and used upon the lands that quantity of water.[4] Although the government diverted, stored and distributed the water, the contention of petitioner that thereby ownership of the water or water-rights became vested in the United States is not well founded. Appropriation was made not for the use of the government, but, under the Reclamation Act, for the use of the land owners; and by the terms of the law and of the contract already referred to, the water-rights became the property of the land owners, wholly distinct from the property right of the government in the irrigation works. Compare *Murphy* v. *Kerr*, 296 Fed. 536,

[2] "The right to the use of water acquired under the provisions of the reclamation law shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right." Act of June 17, 1902, c. 1093, § 8, 32 Stat. 388, 390; Title 43 U. S. C. § 372.

[3] "The right to the use of water which has been applied to a beneficial use in the state shall be and remain appurtenant to the land or place upon which the same is used: . . ." Laws of Wash., 1917, c. 117, § 39, p. 465; Laws of Wash., 1929, c. 122, § 6, p. 274; Rem. Rev. Stat. § 7391, vol. 8, p. 425.

[4] In the Parks case and in the Ottmuller case, the quantity of water thus determined and delivered and used was 6 acre-feet and 5.56 acre-feet of water per acre per annum, respectively.

544, 545. The government was and remained simply a carrier and distributor of the water (*ibid.*), with the right to receive the sums stipulated in the contracts as reimbursement for the cost of construction and annual charges for operation and maintenance of the works. As security therefor, it was provided that the government should have a lien upon the lands *and the water-rights* appurtenant thereto—a provision which in itself imports that the water-rights belong to another than the lienor, that is to say, to the land owner.

The federal government, as owner of the public domain, had the power to dispose of the land and water composing it together or separately; and by the Desert Land Act of 1877 (c. 107, 19 Stat. 377), if not before, Congress had severed the land and waters constituting the public domain and established the rule that for the future the lands should be patented separately. Acquisition of the government title to a parcel of land was not to carry with it a water-right; but all non-navigable waters were reserved for the use of the public under the laws of the various arid-land states. *Power Co.* v. *Cement Co.*, 295 U. S. 142, 162. And in those states, generally, including the State of Washington, it long has been established law that the right to the use of water can be acquired only by prior appropriation for a beneficial use; and that such right when thus obtained is a property right, which, when acquired for irrigation, becomes, by state law and here by express provision of the Reclamation Act as well, part and parcel of the land upon which it is applied.

We are thus brought to the decisive question—is the United States an indispensable party defendant? If so, the suits, however meritorious, must fail, since no rule is better settled than that the United States cannot be sued except when Congress has so provided; and here that has not been done. Petitioner's contention that the United States is an indispensable party defendant and, as it cannot be sued, the suits should have been dismissed, is based upon the propositions, as we understand them, that the United States is the owner of the water-rights; that respondents' claims rest entirely upon executory contracts; and that the relief sought is the substantial equivalent of specific performance of these contracts.

The fallacy of the contention is apparent, because the thus-far undenied allegations of the bill, as already appears, demonstrate

that respondents have fully discharged all their contractual obligations; that their water-rights have become vested; and that ownership is in them and not in the United States. The motion to dismiss concedes the truth of these allegations; but even if they were denied, we should still be obliged to indulge the presumption, in favor of the jurisdiction of the trial court, that respondents might be able to prove them. *United States* v. *Lee*, 106 U. S. 196, 218, 219; cf. *Tindal* v. *Wesley*, 167 U. S. 204, 213 *et seq.* In support of his contention, petitioner relies upon *American Falls Res. Dist. No. 2* v. *Crandall*, 82 F. (2d) 973; but that decision, in so far as it is not in harmony with the view which we have just taken, must be disapproved.

The suits do not seek specific performance of any contract. They are brought to enjoin the Secretary of the Interior from enforcing an order, the wrongful effect of which will be to deprive respondents of vested property rights not only acquired under Congressional acts, state laws and government contracts, but settled and determined by his predecessors in office. That such suits may be maintained without the presence of the United States has been established by many decisions of this court, of which the following are examples: *Noble* v. *Union River Logging R. R.*, 147 U. S. 165, 171-2, 176; *Philadelphia Co.* v. *Stimson*, 223 U. S. 605, 619; *Goltra* v. *Weeks*, 271 U. S. 536, 544; *Work* v. *Louisiana*, 269 U. S. 250, 254; *Payne* v. *Central Pac. Ry. Co.*, 255 U. S. 228, 238. These decisions cite other cases to the same effect. The recognized rule is made clear by what is said in the *Stimson* case:

"If the conduct of the defendant constitutes an unwarrantable interference with property of the complainant, its resort to equity for protection is not to be defeated upon the ground that the suit is one against the United States. The exemption of the United States from suit does not protect its officers from personal liability to persons whose rights of property they have wrongfully invaded. . . . And in case of an injury threatened by his illegal action, the officer cannot claim immunity from injunction process. . . .

"The complainant did not ask the court to interfere with the official discretion of the Secretary of War, but challenged his authority to do the things of which complaint was made. The suit rests upon the charge of abuse of power, and its merits must be determined accordingly; it is not a suit against the United States."

The decree of the court below is

Affirmed.